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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 882.

CANDELARIA CORDOVA, PLAINTIFF IN ERROR,

vs.

WALTER B. GRANT, SOLE EXECUTOR OF THE ESTATE OF FRANK B. COTTON, DECEASED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

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1a *Caption.*

Be it remembered that at a regular term of the United States District Court in and for the Western District of Texas, the Honorable Gordon Russell, United States District Judge, presiding, holding its sessions at El Paso, Texas, and which term began on the 2nd day of October, A. D. 1916, and continued in session to and including the 21st day of October, A. D. 1916, there came on to be heard and determined, among other causes pending on the docket, the following cause:

No. 479*b* (C. C.).

WALTER B. GRANT, Sole Executor and Trustee of Estate of Frank B. Cotton, Deceased,

vs.

CANDELARIA V. DE CORDOVA.

In the District Court of the United States, Western District of Texas.

1b No. 479 (*b*) (C. C.)

WALTER B. GRANT, Sole Executor and Trustee of Estate of Frank B. Cotton, Deceased,

vs.

CANDELARIA CORDOVA.

To the Clerk of said Court:

You are hereby directed by Counsel for Plaintiff in Error, that in preparing the transcript of the record for the Supreme Court of the United States you copy into the transcript the following papers, orders and judgment and none other unless Counsel for Defendant in Error shall designate within the time prescribed by law, other matters to be copied into the transcript, to-wit:

1. Plaintiff's original petition in 479 B, styled Walter B. Grant and W. C. Cotton, Executors and Trustees, v. S. Engelking et al.
2. Order of severance of case as to Candelaria Cordova.
3. Last amended petition of Plaintiff after severance.
4. Second amended original answer of Defendant Candelaria Cordova filed in this court September 22, 1916.

Plaintiff's First Supplemental Petition.

5. Copy of order designating Judge Gordon Russell to preside at the October Term, 1916, of this Court.
6. Order of the Court sustaining Plaintiff's demurrer to defendant's plea to the jurisdiction of the Court.
7. The Verdict of the Jury.

8. The Judgment of the Court.
9. Defendant's Bill of Exceptions.
10. Petition for writ of error.
1c 11. Assignment of errors.
12. Order of court allowing writ of error and fixing amount of bond.
13. Bond for Writ of Error.
14. Order approving bond of writ of error or supersedeas bond.

The original writ of error and citation in error will be attached to end of record, not copied.

F. G. MORRIS &
B. BRYAN,
Attorneys for Plaintiff in Error, Candelaria Cordova.

We, the attorneys for defendant in error accept service of the within præcipe this the 22nd day of December, 1916.

BEALL, KEMP & NAGLE,
Attorneys for Defendant in Error.

Endorsements: No. 479*b* (C. C.). United States District Court Western District of Texas, El Paso Division. Walter B. Grant, Sole Executor and Trustee of Estate of Frank B. Cotton, deceased, vs. Candelaria Cordova. Præcipe for Transcript of Record for appeal to the Supreme Court of the United States. Filed, December 22nd, 1916. D. H. Hart, Clerk, by Saml. L. Kelly, Deputy.

1d In the United States District Court, Western District of Texas, El Paso Division.

No. 479 C. C.

WILLIAM C. COTTON and WALTER B. GRANT, Independent Executors of the Estate of Frank B. Cotton, Deceased,

vs.

S. ENGELKING et als.

April 6th, 1916.

The motion of the defendant, Candelaria Cordova, asking a severance from her co-defendants in this cause, and a separate trial thereof as to the issue joined between herself and the plaintiffs coming on to be heard on this 6th day of April A. D. 1916, and having been considered by the Court, it is the opinion of the Court that the said motion should prevail;

It is therefore ordered and adjudged by the Court that as to the defendant Candelaria Cordova herein a severance be and the same is hereby made from her co-defendants, and that a separate trial be had as to the issue joined between plaintiffs and said defendant, and that the said cause be docketed and styled on the docket of this Court as No. 479 (B) C. C., Walter B. Grant, Sole Surviving Execu-

tor of the Estate of Frank B. Cotton, Deceased, vs. Candelaria Cordova.

(Endorsements:) No. 479 (*b*) C. C. Walter B. Grant. Sole Surviving Executor vs. S. Engelking, et al. Candelaria Cordova. Order granting severance as to Candelario Cordova. Filed and entered April 6th 1916. D. H. Hart, Clerk, by Geo. B. Oliver, Deputy.

2 In the District Court of the United States for the Western District of Texas, at El Paso.

No. 479*b* (C. C.). Law.

WALTER B. GRANT, Independent Executor,

vs.

CANDELARIA V. DE CORDOVA.

To the Honorable Judge of said Court:

Now comes Walter B. Grant, sole surviving independent executor of the Will and Estate of Frank B. Cotton, deceased, plaintiff in the above numbered and entitled cause, and by leave of the Court first had and obtained, files this, his Second Amended Original Petition, in lieu of his First Amended Original Petition, in so far as this severed case is concerned, said First Amended Original Petition having been heretofore filed in cause No. 479 Law, on the docket of this Court, and being entitled, William C. Cotton and Walter B. Grant, executors, vs. S. Engelking, et al., and for such Second Amended Original Petition, plaintiff says:

Now comes Walter B. Grant, herein acting and suing as independent executor of the Last Will and Testament of Frank B. Cotton, deceased, and as sole surviving executor of said Will, and, as such sole surviving executor, is also the sole surviving trustee and residuary legatee under said Will, hereinafter called plaintiff, complaining of Candelaria V. de Cordova, hereinafter called defendant, and respectfully represents that this suit was originally brought by William C. Cotton and Walter B. Grant, independent executors of the Will and Estate of Frank B. Cotton, deceased, against the above named defendant, Candelaria V. de Cordova and others, on the 29th day of August, 1908, and that the said defendant, Candelaria V. de

3 Cordova, secured a severance at the April Term, 1916, of this Court and she is, therefore, the only defendant in said severed case; and that the said William C. Cotton and Walter B. Grant, at the time of the filing of this suit and at all times up to the date of the death of the said William C. Cotton, were both citizens of the Commonwealth of the State of Massachusetts, and resided in the County of Suffolk, in said commonwealth; and that your petitioner, Walter B. Grant, ever since said time was and still is a citizen of the commonwealth of Massachusetts, and resided in and still resides

in the County of Suffolk, in said Commonwealth, and that said Frank B. Cotton in his life time was a resident citizen of the State of Massachusetts, and that all the defendants in said original suit, at the time of the institution of said suit, including the said defendant, Candelaria V. de Cordova, were citizens of the State of Texas, and residents of El Paso County, Texas; and the said defendant, Candelaria V. de Cordova, at the time of the filing of said suit, was and still is, a citizen of the State of Texas and a resident of El Paso County, Texas; and that the matters and amount in dispute in this suit at all times exceeded and still exceeds the sum or value of Thfee Thousand ($3,000.00) Dollars, exclusive of interest and costs; and that this is a suit of a civil nature and that there is herein a controversy which is wholly between citizens of different states.

2.

That on the 1st day of July, 1907, plaintiff, in his capacity as independent executor of the last Will and Testament of Frank B. Cotton, deceased (in connection with his co-executor, William C. Cotton, now deceased) was lawfully seized and possessed of certain tracts of land situated in El Paso County, Texas, holding and claiming the same in fee simple, under and by virtue of the said Last Will and Testament of the said Frank B. Cotton, deceased, and that long prior thereto and during the lifetime of said Frank B. Cotton, now deceased to-wit: on the 12th day of January, 1881, the said Frank B. Cotton was lawfully seized and possessed of
4 the lands hereinafter described, holding and claiming the same in fee simple from said date last named to the time of his death. That the lands lawfully seized and possessed of as aforesaid are described as follows, to-wit:

All of the South end of the N. W. Burdett Surveys No. 1 and No. 2, lying and being situated in the City and County of El Paso, County of El Paso, and State of Texas, bounded and described as follows, to-wit:

a. Beginning on the west line of the N. W. Burdett Survey No. 2, at a point 3008 vrs. south from the northwest corner of said survey; thence north 710 feet to the right of way of the Texas & Pacific Railway Company; thence along said right of way north 61 degrees 30 minutes east 1196 feet to a point; thence with the right of way of the said Texas & Pacific Railway Company north 28 degrees 30 minutes west 200 feet to a point; thence along said right of way of the said railway company north 61 degrees 30 minutes east 1030 feet to a stake; thence south 44 degrees 14 minutes west 2689 feet and 6 inches to the place of beginning.

b. Beginning at an iron pipe, same being the southwest corner of the above described tract of land, running north 44 degrees 14 minutes east 2689 feet and 6 inches with the southeast line of the above described tract of land to a stake; thence south 5094 feet and 8 inches to a stake set on the bank of the Rio Grande river; thence south 75 degrees 20 minutes west 1912 feet to a stake set on the bank of the

Rio Grande river; thence north 3643 feet and 6 inches to the place of beginning.

c. Another tract of land, adjoining the tract above described, which is described as follows: Beginning at a stake and mound standing on the east line of the said N. W. Burdett survey No. 2 and on the south bank of the Rio Grande river, said stake and mound being 3060 varas due south from the northeast corner of said N. W. Burdett survey No. 2; thence with the east line of said Burdett survey No. 2 south 1418½ varas to a stake standing on the north bank of said Rio Grande river; thence down and along said Rio Grande, with its meanders, and with the south west and south lines of the tract hereinafter described, to the place of beginning.

d. Another tract of land, adjoining the land above described in paragraph "c", which is bounded and described as follows, to-wit: Beginning at a point 1866 feet and 6 inches east of the original southwest corner of the said N. W. Burdett survey No. 2; thence south 88 degrees 30 minutes east 1427 feet and 8 inches to a stake; thence south 68 degrees east 166 feet and 6 inches to a stake; thence south 49 degrees 45 minutes east 277 feet and 7 inches to a stake; thence south 25 degrees 30 minutes east 833 feet and 3 inches to a stake; thence south 15 degrees 20 minutes east 444 feet and 3 inches to a stake; thence south 1 degree east 384 feet to a stake; thence north 49 degrees 10 minutes East 673 feet and 1 inch to a stake; thence north 26 degrees 50 minutes west 1400 feet to a stake; thence north 38 degrees 55 minutes west 1310 feet to a stake; thence north 59 degrees 22 minutes west 886 feet to a stake; thence north 77 degrees 34 minutes west 528 feet to a stake; thence south 1376 feet to the place of beginning.

That the said tracts of land are bounded south by the Rio Grande River; east by said River or the banks of the old channel of said river; and on the west by what is known as Magoffin's Addition to the City of El Paso; and on the north by what is known as the Texas & Pacific Railway reservation or right of way.

3.

That the said premises are worth more than $200,000.00; that the defendant, Candelaria V. de Cordova, afterwards, to-wit: on the 15th day of July, 1907, unlawfully entered upon and dispossessed plaintiff (and his co-executor, Wm. C. Cotton, now deceased) of said premises and withholds from him as the independent executor of the last Will and Testament of said Frank B. Cotton deceased, the possession thereof, to his damage in the sum of $200,000.00; that the reasonable annual rental value of said land and premises is $20.000.00; that by reason of said unlawful taking and holding possession of said premises the defendant, Candelaria V. de Cordova, became liable and promised to pay plaintiff the reasonable rental value of said premises, no part of which has been paid; that said defendant is a naked trespasser upon said premises and has no title or color of title to the same.

4.

And plaintiff further represents that the said Frank B. Cotton, deceased, has had and held peaceable, continuous and adverse possession, under color of title from and under the State of Texas, of all the land described in this petition, for more than three (3) years prior to the taking thereof by the defendant, Candelaria V. de Cordova, and paid the State and County and municipal taxes thereon during said time.

Wherefor*d*, plaintiff says that the said Frank B. Cotton, deceased, acquired good and sufficient title to said land by the statute of limitation of three years.

5.

And plaintiff further represents that the said Frank B. Cotton, deceased, and those through and under whom he claimed to hold title and those through and under whom plaintiff claims to hold title to said premises described in this petition, have had and held peaceable, continuous and adverse possession of said real estate described in this petition,, cultivating, using and enjoying the same and paying taxes thereon, and claiming the same under deeds duly registered, for more than five years before the defendant, Candelaria Cordova, entered thereon.

Wherefore, plaintiff says that the said Frank B. Cotton, and his estate have acquired good and sufficient title to said land by the statute of limitation of five years.

6.

And plaintiff further represents that the said Frank B. Cotton, deceased, and those under whom he claimed title to said premises described in this petition, have held peaceable, continuous, and adverse possession thereof, cultivating, using and enjoying the
7 same, and claiming the same under good and perfect right and title duly registered, for the period of more than ten years before the defendant, Candelaria V. de Cordova, unlawfully entered upon the same.

Wherefore, plaintiff says that the said Frank B. Cotton deceased, and his estate have acquired good and sufficient title thereto by the Statute of limitation of ten years.

7.

And plaintiff further represents that in addition to the deeds duly recorded under which he claims title to the premises described in this petition as independent executor of the Last Will and Testament of Frank B. Cotton, deceased, he is entitled to the title and possession of said premises under his said pleas of three, five and ten years' limitation, and that the defendant, Candelaria V. de Cordova, has no

title or color of title to said premises, but is a mere naked trespasser thereon.

8.

That on the 11th day of May, 1907, the said Frank B. Cotton, died testate and left a Will in which the original plaintiffs in cause No. 479 Law, (of which this is a severed case) William C. Cotton and Walter B. Grant, were appointed independent executors, which Will was duly admitted to probate on or about the 26th day of June, 1907, in the Probate Court of Norfolk County, Commonwealth of Massachusetts, and letters therefrom duly issued to the said original plaintiffs, William C. Cotton and Walter B. Grant, who, at the time of the filing of this suit, were independent executors under said Will and ever since said time the plaintiff, Walter B. Grant, has been and still is independent executor under said Will.

Plaintiff further represents that the said Will has been duly admitted to probate in the County Court of El Paso County, Texas, and the said William C. Cotton and Walter B. Grant, by an order of said Court, duly made and entered, were recognized and named as
8 executors under said Will, which was duly filed and recorded in the Probate minutes of El Paso County, Texas.

That under the terms of said Will, the said Frank B. Cotton, deceased, devised and bequeathed to the said William C. Cotton, and Walter B. Grant, as executors thereunder, and to the survivor of them, all of his property, real and personal, in El Paso County, and elsewhere in Texas, upon trust, and that the said executors, William C. Cotton and Walter B. Grant, brought this cause of action against the above named defendant, Candelaria V. de Cordova, and plaintiff, Walter B. Grant, here now prosecutes this cause against said defendant, as sole surviving independent executor of said Last Will of said Frank B. Cotton, deceased, and as the holder of the legal title to the above described property in trust, as in said Will is provided, for the recovery of the title and possession of the land hereinabove described which belongs to said estate.

9.

Plaintiff, Walter B. Grant, as independent executor, legatee and owner of the above described property in trust as provided in said Will, respectfully represents that his co-plaintiff, William C. Cotton, died on or about the 15th day of May, 1913, and that he is the sole surviving executor of the Will and Estate of the said Frank B. Cotton, deceased, (the other executor named in said Will with the said William C. Cotton and Walter B. Grant having declined to act or qualify as such), and that under the provisions of said Will the surviving executor succeeds to all of the rights and title held by any deceased executor; and your petitioner, Walter B. Grant, here now prosecutes this suit as sole independent surviging executor of the Will of said Frank B. Cotton, deceased, and as a legatee under said Will, holding the title to said property in trust under said Will.

10.

Wherefore, plaintiff prays that upon a hearing hereof, he,
9 in his capacity of independent executor of the Last Will and Testament of the said Frank B. Cotton, deceased, and as holder of the title to all of the property belonging to the estate of said Frank B. Cotton, deceased, in trust, as in said Will is provided, have judgment against said defendant, Candelaria V. de Cordova, for the title and possession of the above described premises and for restitution and possession thereof, and for his rights and damages and all costs of suit and for judgment against the sureties of said defendant, on her replevin bond filed in this cause; and plaintiff further prays for costs of suit and general and special relief, which under the law and facts, he may be entitled to.

(Signed) BEALL, KEMP & NAGEL,
(Signed) TURNEY & BURGESS,
(Signed) WALTER B. GRANT,
Attorneys for Plaintiff, Walter B. Grant, as Executor and Trustee of the Will and Estate of Frank B. Cotton, Deceased.

(Endorsements:) No. 479*b* (C. C.) Law. Walter B. Grant, Independent Executor, vs. Candelaria V. de Cordova. Plaintiff's Second Amended Original Petition. Filed Aug. 12, 1916. D. H. Hart, Clerk, by Saml. L. Kelly, Deputy.

10 In the District Court of the United States, Western District of Texas, at El Paso, Texas.

No. 479. Law.

WALTER B. GRANT and W. C. COTTON, Executors and Trustees, Plaintiffs,

vs.

S. ENGELKING et al., Defendants.

Now comes the defendant Candelaria Cordova, and leave of the Court being first obtained, files this her Second Amended Original Answer, as follows:

I.

This defendant comes now and pleads to the jurisdiction of this court as she did plead in her former answer with less elaboration, and shows to the court that she claims the right of possession of the lands hereinafter described, which the plaintiff claims is embraced within the chain of title under which plaintiff claims. That the question of title and right of possession involved in the case neces-

sarily involves a trial and decision by this court as to the true location of the International boundary between the United States of America and the Republic of Mexico, that is to say that the plaintiff claims the land involved in this suit under a regular chain of title from the state of Texas to the land in controversy, and this defendant who is the surviving widow of Pablo Cordova, deceased, who died intestate, claims the right of possession under the title of her sons Adolfo Cordova and Jose Cordova, who are sole heirs at law of Pablo Cordova, deceased, who owned it as his separate property at the time of his death, and was at the time of his death in possession of the land hereinafter described, and of which this defendant, in the right and by the permission and consent of her said sons, together with them, has ever since been possessed under a regular chain of title under the duly constituted authorities for the transmis-
11 sion of such title under the Republic of Mexico and the State of Chihuahua therein, which lands and the title of said Pablo Cordova and his said sons and sole heirs at law are described as follows:

First. All that certain tract of land which was by a certain instrument in writing executed July 18, 1827, by Francisco Rascon, Second Constitutional Alcalde of the Village of Our Lady Guadalupe of El Paso del Norte, upon the petition of Maria Rosa Telles. Said tract of land is thus described: From north to south, on the east side, it has one hundred and thirteen (113) varas, adjoining the land of Don Francisco Martines. From east to west, on the north side, it has four hundred and sixty-eight (468) varas, and bounded by lands of Jose de Herrera. From north to south, on the west side, it has one hundred and twenty-seven (127) varas, and was bounded by the public road and the acequia of the petitioner (Maria Rosa Telles). From west to east, on the south side the measurements making an angle, it has four hundred and ninety-five (495) varas, and is bounded by land of Perfecto de Avalos and Tiburcio Madrid.

The tract of land above described was conveyed in the year of 1842 by Cano Lucero, Mariano Lucero, Francisco Lucero and Nicolas Lucero, children and only heirs of Maria Rosa Telles and her deceased husband Felipe Lucero, to Don Jose Morales and by Refugia Morales de Montes, heir of Don Jose Morales, deceased, and her husband, Ramon Montes, conveyed on the 19th day of May 1888 to Pablo Cordova, deceased father of these grantors.

Second Tract. Also all of that tract of land which was by certain instrument, in writing, executed July the 18th, 1827, by Francisco Rascon, Second Constitutional Alcalde aforesaid, granted and conveyed to Jose Maria Cordova, and was thus described: From south to north, on the east side, it had one hundred and fifty (150) varas, bounded by lands of Don Simon Montoya. From east to west on the north side, it had four hundred and forty-eight (448) varas and bounded by the Madrilitos. From north to south on the west side, it had one hundred and fifty (150) varas and it was bounded
12 by the public road. From west to east, on the south side, it had four hundred and forty-eight (448) varas and it was bounded by lands of Leonicio and Agaton Vargas.

The above described tract of land is the same land that was conveyed on the third day of July 1890, to Hilario Avalos by Manuel Cordova, son and heir of Jose Maria Cordova, deceased, and by said Hilario Avalos, on the 18th day of July, 1890, conveyed the same tract of land to Pablo Cordova.

Third Tract. Also, all that certain tract of land which was by an instrument of writing, executed July 18, 1827, by Francisco Rascon, Second Constitutional Alcalde aforesaid, granted and conveyed to Perfecto Avalos, and is thus described: From south to north, on the east side, it had one hundred and thirteen (113) varas and bounded by lands of Tiburcio Madrid. From east to west, on the north side, it had four hundred (400) varas and bounded by lands of Maria Rosa Telles. From north to south on the west side, it had one hundred and thirteen (113) varas and was bounded by the public road and acequia of the petitioner. From west to east, on the south side, it had four hundred (400) varas and was bounded by land of Jose Maria Cordova. Said tract of land being the same that on the 5th day of July, 1890, was conveyed by the heirs of Perfecto Avalos to those grantors' father, Pablo Cordova.

Fourth Tract. Also, all that certain tract of land, which was by an instrument of writing, dated April the 5th, 1827, by Agapito Albo, First Constitutional Alcalde, granted and conveyed to Ana Maria Aveita (widow of Joaquin Ydalgo) and which was described as follows: From north to south, on the west, it had two hundred and thirty-nine (239) varas and was bounded by lands of Pedro Avillar. From west to east on the north, it had one hundred and forty-one and three-fourths (141¾) varas; bounded by lands of Pedro Avillar and Jose Morales. Thence, from north to south, on the east, it had two hundred and eighty-three and three-fourths (283¾) varas and was bounded by lands of Secundino Padilla; and thence from east to west, on the south, it had three hundred and thirty and
13 one-half (330½) varas; and bounded by lands of Lucas Herrera up to an alamo, which was the beginning point of the measurement.

Fifth Tract. Also all of that certain tract of land which by an instrument in writing, dated April the 5th 1827 and executed by Agapito Albo, First Constitutional Alcalde, was granted and conveyed to Secundino Padilla the following described land: From south to north, on the east, it had two hundred and eighty five (285) varas and was bounded by lands of citizen Jose Morales. From east to west, on the north, it had one hundred and twelve (112) varas and was bounded by the said Jose Morales' lands. From north to south, on the west, it had two hundred and eighty-three (283) varas; and was bounded by the lands of Ana Maria Aveita. From west to east on the south, it had one hundred and five (105) varas and was bounded by the lands of Don Francisco Martines.

Sixth Tract. Also, all of that certain tract of land which was originally granted and titled to Pedro Avillar and by a deed dated November 15th, 1893, conveyed by Maria Alvillar de Sambrano and her husband Placido de Sambrano, heirs of Pedro Alvillar, deceased, to Pablo Cordova, the father of these grantors; and which said tract

of land is thus described: From north to south on the west, it had three hundred and fifty (350) varas and bounded by the Camino Salinero (Road to the Salt Mines). From west to east, on the south, it had three hundred and fifty (350) varas, was bounded by the lands of Gregorio Herrera. From south to north on the east, it had three hundred and fifty (350) varas and was bounded by the lands of Ana Maria Aveita and other persons; and from east to west, on the north side, it has three hundred and fifty (350) varas and was bounded by "Terrenos Baldeos" and the road to the Salt Mines.

Seventh Tract. Also, all that certain tract which was conveyed to Hilario Avalos by Victoriano Avalos by a deed dated April 10, 1849, which deed and tract of land was conveyed to these grantors' father, Pablo Cordova: and said tract is thus described: From north to south, on the west, it has four hundred and fifty (450) varas, and is bounded by lands of Doña Josefa Herrera. From west to
14 east, on the south side, it had four hundred and fifty (450) varas and was bounded by lands of Doña Josefa Rival. From south to north, on the east, it had three hundred and forty-five (345) varas. From east to west, on the north, it had three hundred and fifty (350) varas and it was bounded by an acequia of various partitioners.

That all of said land is situated west of the Rio Grande as it was located and established by Messers. Emory and Salazar, commissioners respectively of the United States of America and the Republic of Mexico, as the boundary established between said governments in A. D. 1852 and 1853, and all of said land was situated in the State of Chihuahua and Republic of Mexico in 1852 and at all times prior thereto and during the existance of Mexico. That since the year 1852, the Rio Grande has established its location many hundreds of yards south or southwest of its position in 1852, and south and southwest of the land in controversy so that the land involved in this suit is now situated north and east of the present Rio Grande channel and the question on which the title claimed under by the plaintiff depends, and on which the record title of defendant's sons and her right of possession depends is whether or not the said river so changed its position as to be considered as remaining at all times the boundary between said two republics, or so changed its location as that the boundary of 1852 or some position between that boundary and the present bed of said river and south of the lands, or south of some of the lands, involved in this suit, is the present boundary between the United States of America and the Republic of Mexico. That if it should be decided that the land in dispute is not within the United States of America, then the plaintiff is without title, even if he owns all such title as the patents under which claims passed from the State of Texas (which defendant does not admit but denies), and must fail in the suit whether defendant has title or right of possession, or not, and she being in possession is entitled to remain in possession as between her and the plain-
15 tiff, and if defendant's sons, under whom she holds, have title under the Government of Mexico, their title must protect them. And this defendant shows to the court that while in the ab-

sence of treaties vesting the jurisdiction to determine such boundary question in specially designated authorities, this court might try this case and determine said boundary question as it had been determined by the political or executive departments of this Government, if such political and executive departments had determined and decided such boundary question, yet this defendant shows to the court that while the United States Government exercises at present a de fac-o jurisdiction over the territory where the land involved in this suit is located, that it does not exercise said jurisdiction under claim that said boundary exists at the present bed of the Rio Grande, but expressly with the admission in its treaties and departmental correspondence with the authorities of Mexico, that said boundary is unsettled and undetermined in such manner as to present an open question for decision by the respective political or executive departments of said governments so that the ordinary probative force, or conclusiveness on the courts of the exercise of a de facto jurisdiction does not obtain in this instance. And further more, this defendant shows to the court that the treaties and acts of the respective governments placing said boundary disputes within the jurisdiction of certain special authorities, of which this court must take judicial notice, must necessarily have deprived the courts of each of said republics of jurisdiction to decide litigation between private claimants with respect of land situated within the disputed area, wherein it is necessary to decide as to the true location of the boundary between said governments in order to determine the question of title involved.

Wherefore, this defendant prays that this Court refuse to exercise jurisdiction to try this cause, and that this court either dismiss this cause for want of jurisdiction or enter an order staying a trial of this cause until the said boundary between said governments shall be established.

16 II.

And this defendant, if the court shall overrule her plea to the jurisdiction of the court, saving exception to such ruling and not waiving such exception, but subject to her right to revision of such ruling, this defendant for further plea in this behalf, says she is not guilty of the wrongs, trespasses and injuries complained of in plaintiff's petition; and of this she puts herself upon the country.

III.

And this defendant, if her plea to the jurisdiction of the court shall be overruled, not waiving but insisting on her exception to such ruling, this defendant for further answer in this behalf says that the plaintiff ought not to have or maintain his alleged cause of action for that Pablo Cordova, and his sons since his death and this defendant holding in their behalf, held adverse, peaceable and continuous possession of each of the tracts of land described in her plea to the jurisdiction herein, to which reference is here made for de-

scription, for more than ten years before the institution of this suit, cultivating, using and enjoying the same, wherefore the said Pablo Cordova and his sons acquired title to said lands under the statutes of limitation of the State of Texas, if said lands are held by the court to be situated in the State of Texas, which outstanding title in said Adolfo Cordova and Jose Cordova this defendant pleads herein, as well as her right of possession which she held under them when this suit was instituted and long prior thereto, and by virtue of which she now holds with them possession of said lands.

Signed) F. G. MORRIS &
B. BRYAN,
Attorneys for Defendant.

(Endorsements:) No. 479*b* (C. C.). In Dist. Court of United States, Western Dist. of Texas, at El Paso, Texas. Walter B. Grant and W. C. Cotton, Executors and Trustees, Plaintiffs, vs. S. Engelking et al., Defendants. Second Amended Original Answer of Defendant Candelaria Cordova. Filed Sept. 29, 1916. D. H. Hart, Clerk, by S. L. Kelly, Deputy.

17 In the District Court of the United States for the Western District of Texas, at El Paso.

No. 479*b* (C. C.).

WALTER B. GRANT, Executor of the Will and Estate of Frank B. Cotton, Deceased,

vs.

CANDELARIO V. DE CORDOVA.

Now comes the plaintiff, Walter B. Grant, Executor and Trustee as heretofore alleged, and, by leave of the Court first had and obtained, files this its first supplemental petition in reply to the Third Amended Original Answer of the defendant filed herein on this the 2nd day of October, 1916, and for such supplemental petition says:

I.

Plaintiff excepts to the defendant's plea to the jurisdiction contained in his said Third Amended Original Answer for the reason that the said plea to the jurisdiction shows upon its face that the United States of America and the State of Texas have and are exercising jurisdiction over the property in controversy and that the same is now and long has been subject to the laws of the United States of America and the State of Texas, as *is* is also known juridicially to this Court, and as to this plaintiff prays judgment of the Court.

(Signed) TURNEY & BURGES,
BEALL, KEMP & NAGEL,
Attorneys for Plaintiff.

2.

And further answering said Third Amended Original Answer of defendant, said plaintiff comes now and denies, all and singular, the allegations in defendant's said answer contained and says the
18 same are not true and that it is not guilty of the supposed wrongs, injuries or torts therein complained of, and of this puts himself upon the country.

(Signed) TURNEY & BURGES,
BEALL, KEMP & NAGEL,
Attorneys for Plaintiff.

3.

This plaintiff says that while it is true that there *there* was an attempt to determine by arbitration a dispute as to the international boundary line between the United States of America and the United States of Mexico at and in the neighborhood of the land in controversy in this case that the said arbitration failed and that the United States Government declined to acknowledge any settlement by the arbitral court and that the said arbitral Court wholly failed to find and determine the said boundary line or to locate the same so that it might be known to either government or any citizen thereof; that ever since such failure on the part of the court of arbitration the government of the United States has held (and had theretofore held) the said land and now holds and exercises jurisdiction thereover; and that the Government of the State of Texas and said City of El Paso enforce their laws upon the said land in all respects; that prior to the said arbitration proceedings, at least the hearing before the Court of arbitration, the Government of the United States and the Government of Mexico duly entered into an agreement whereby one Wilbur Keblinger was authorized and empowered to investigate the matter of occupancy of said land by persons claiming the same either under the laws of the United States of America and State of Texas, or under the laws of the Republic of Mexico or State of Chihuahua thereof, and that it was then and there agreed by and between the two governments that suits might be instituted and maintained in the Courts of the United States and State of Texas involving the rights to the title or possession of any lands within the disputed area, which the said Keblinger should hold to be proper subjects and litigation of the Courts of the
19 United States of America or of the State of Texas, and under and by virtue of the authority given him by the two governments he heard and determined that the dispute between this plaintiff and the defendant herein, Candelario V. de Cordova, is properly justiciable for the Courts of the United States of America, and the State of Texas and that his finding has been acquiesced in by both Governments.

4.

This plaintiff says that as hereinbefore stated the land is within the territorial jurisdiction of the United States of America, that is to say within the land over which this Government is exercising dominion and control, that in a contorversy existing between plaintiff and defendant as to the title and possession of said land it is necessary a tribunal should exist somewhere for the determination of their respective rights, that, in law and in fact, the only tribunal which could determine their rights and exercise jurisdiction over said property is the Court of the United States of America, for the Western District of Texas; that the political and executive departments of said Government now claim and have heretofore at all times claimed said land as being within the territorial limits of the United States of America and enforce the Civil and Criminal laws over said land:

Therefore, this Court has and should exercise the jurisdiction to determine the controversy between the parties herein.

(Signed) TURNEY & BURGES,
BEALL, KEMP & NAGEL,
Attorneys for Plaintiff.

(Endorsements:) No. 479*b* (C. C.). In the District Court of the United States for the Western District of Texas, at El Paso. Walter B. Grant, Executor of the Will and Estate of Frank B. Cotton, Deceased, vs. Candelario V. de Cordova. Plaintiff's First Supplemental Petition. Filed October 2, 1916. D. H. Hart, Clerk.

20 UNITED STATES OF AMERICA,
Fifth Judicial Circuit:

Whereas, it has been made to appear by the certificate of the Clerk of the District Court of the United States for the Western District of Texas, under the seal of the Court, that, from the accumulation of business in said District, the public interests require the designation and appointment of the Judge of another District to have and exercise within the District first named the same powers that are vested in the Judge thereof,

Now, therefore, I, Richard W. Walker, Circuit Judge of the United States for the Fifth Judicial Circuit, do hereby designate and appoint the Honorable Gordon Russell, United States District Judge for the Eastern District of Texas, to have and exercise within the Western District of Texas until the first day of December, 1916, the same powers that are vested in the Judge thereof.

Witness my hand this, 19th day of August, 1916.

(Signed) R. W. WALKER,
United States Circuit Judge.

UNITED STATES OF AMERICA,
Western District of Texas:

I, D. H. Hart, Clerk of the District Court of the United States for the Western District of Texas, do hereby certify that the above is a true and correct copy of the order designating Hon. Gordon Russell to act as United States District Judge for the Western District of Texas, as the same appears on file and of record in this office.

Witness my official signature and the seal of said District Court at office in the City of Austin, Texas, this the 21st day of August, A. D. 1916.

[SEAL.] (Signed) D. H. HART, *Clerk.*

21 (Endorsements:) United States District Court Western District of Texas E. Paso Division. Order designating and appointing Honorable Gordon Russell to act as Judge of Western District of Texas until December 1st, 1916. Filed August 23d, A. D., 1916. D. H. Hart, Clerk, by S. L. Kelly, Deputy.

22 UNITED STATES DISTRICT COURT,
Western District of Texas,
El Paso Division:

No. 479 (*b*) C. C.

WALTER B. GRANT, Sole Executor of the Estate of Frank B. Cotton, Deceased,

vs.

CANDELARIA V. DE CORDOVA.

October 2, 1916.

This day this cause coming on to be heard upon the exceptions of the plaintiff to the plea to the jurisdiction heretofore filed in this cause by the defendant, and the said exceptions and the argument of counsel thereon having been heard and duly considered by the Court, it is ordered by the Court that the said exceptions be, and the same are hereby sustained, to which ruling and action of the Court in sustaining said exceptions the defendant, by her counsel, in open Court then and there duly excepted.

(Endorsements:) No. 479, *b* (C. C.) United States District Court Western District of Texas El Paso Division. Walter B. Grant, Executor, vs. Candelaria V. de Cordova. Order sustaining Plaintiff's Exceptions to Defendant's plea to jurisdiction. Filed and entered, Oct. 2, 1916. D. H. Hart, Clerk, by S. L. Kelly, Deputy.

23 In the United States District Court for the Western District of Texas, at El Paso, Texas.

10-5-1916.

Verdict of the Jury in the Case of —— —— vs. —— ——.

We the jury find for the plaintiff the land in controversy.
(Signed) J. W. FERGUSON, *Foreman.*

(Endorsements:) No. 479 (B). U. S. District Court. Walter B. Grant, sole executor, &c., vs. Candelaria Cordova. Verdict. Filed October 5, 1916. D. H. Hart, Clerk.

24 In the District Court of the United States for the Western District of Texas, at El Paso.

No. 479 *b* (C. C.).

WALTER B. GRANT, Independent Executor of the Last Will and Testament of Frank B. Cotton, Deceased,

vs.

CANDELARIA V. DE CORDOVA.

Be it remembered that on the 2nd day of October, 1916, at a regular Term of this Court, the above numbered and entitled cause was called for trial, whereupon the plaintiff, Walter B. Grant, independent Executor and Trustee of the Last Will and Testament of Frank B. Cotton, deceased, presented to the Court his Special Exception directed at the plea to the jurisdiction as contained in the Third Amended Original Answer of the defendant, Candelaria V. de Cordova, and said exception having been considered by the Court after argument by attorneys for both the plaintiff and defendant, and the Court being of the opinion that said exception is good, which said exception of the plaintiff, by the Court on said 2nd day of October, 1916, was and hereby is sustained, to which action of the Court in sustaining said special exception the defendant, Candelaria V. de Cordova, by her attorneys, then and there, in open Court, excepted; and, thereafter, on the 3rd day of October, 1916, the said above numbered and entitled cause was called for trial and the plaintiff appeared in person and by attorney and announced ready for trial and the defendant declined to announce, whereupon, the Court ordered the defendant to proceed with the trial of said cause, and plaintiff appearing in person and by attorney and defendant appearing by attorney, a Jury of good and lawful men, to-wit: J. W. Ferguson and eleven (11) others were duly selected, empanelled and sworn to try said cause;

Thereupon, the trial of said cause proceeded from day to day until this the 5th day of October, 1916, when the Jury having

25 heard the pleading, evidence and argument of counsel and having received the Charge of the Court retired to consider of their verdict, and thereafter, on the 5th day of October, A. D. 1916, returned into open Court the following verdict, to-wit:

"In the United States District Court for the Western District of Texas, at El Paso, Texas.

10-5-1916.

Verdict of the Jury in the Case of Grant vs. Cordova.

We the jury find for the plaintiff the land in controversy.

J. W. FERGUSON, *Foreman.*"

which said verdict was received by the Court and the Clerk was directed to file the same and filed his endorsement thereon as follows, to-wit:

"No. 479 (B). U. S. District Court. Walter B. Grant, Sole Executor, &c., vs. Candelaria Cordova.
Verdict.
Filed October 5, 1916. D. H. Hart, Clerk."

It is, therefore, on this the 5th day of October, 1916, ordered, adjudged and decreed by the Court that the plaintiff, Walter B. Grant, as sole surviving independent executor of the Last Will and Testament of Frank B. Cotton, deceased, and as sole, surviving trustee and residuary legatee under said Will, do have and recover of and from the said defendant, Candelaria V. de Cordova, the land and premises in controversy, to-wit: the land and premises described in plaintiff's Second Amended Original Petition, which land and premises are particularly described as follows, to-wit:

All of the South end of the N. W. Burdett Surveys No. 1 and No. 2, lying and being situated in the City of El Paso, County
26 of El Paso, and State of Texas, bounded and described as follows, to-wit:

a. Beginning on the West line of the N. W. Burdett Survey No. 2, at a point 3008 vrs. south from the northwest corner of said survey; thence north 710 feet to the right of way of the Texas & Pacific Railway Company; thence along said right of way north 61 degrees 30 minutes east 1196 feet to a point; thence with the right of way of the said Texas & Pacific Railway Company north 28 degrees 30 minutes west 200 feet to a point; thence along said right of way of the said Railway company north 61 degrees 30 minutes east 1030 feet to a stake; thence south 44 degrees 14 minutes west 2689 feet and 6 inches to the place of beginning.

b. Beginning at an iron pipe, same being the southwest corner of the above described tract of land, running north 44 degrees 14 minutes east 2689 feet and 6 inches with the southeast line of the above described tract of land to a stake; thence south 5094 feet and 8

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inches to a stake set on the bank of the Rio Grande river; thence south 75 degrees 20 minutes west 1912 feet to a stake set on the bank of the Rio Grande river; thence north 3643 feet and 6 inches to the place of beginning.

c. Another tract of land, adjoining the tract above described, which is described as follows: Beginning at a stake and mound standing on the east line of the said N. W. Burdett survey No. 2, said stake and mound being 3060 varas due south from the northeast corner of said N. W. Burdett survey No. 2; thence with the east line of said Burdett Survey No. 2 south 1418½ varas to a stake standing on the north bank of said Rio Grande river; thence down and along said Rio Grande, with its meanders, and with the southwest and south lines of the tract hereinafter described, to the place of beginning.

d. Another tract of land, adjoining the land above described in paragraph "*c*," which is bounded and described as follows, to-wit: Beginning at a point 1866 feet and 6 inches east of the original southwest corner of the said N. W. Burdett survey No. 2; thence south 88 degrees 30 minutes east 1427 feet and 8 inches to
27 a stake; thence south 68 degrees east 166 feet and 6 inches to a stake; thence south 49 degrees 45 minutes east 277 feet and 7 inches to a stake; thence south 25 degrees 30 minutes East 833 feet and 3 inches to a stake; thence south 15 degrees 20 minutes east 444 feet and 3 inches to a stake; thence south 1 degree east 384 feet to a stake; thence north 49 degrees 10 minutes east 673 feet and 1 inch to a stake; thence north 26 degrees 50 minutes west 1400 feet to a stake; thence north 38 degrees 55 minutes west 1310 feet to a stake; thence north 59 degrees 22 minutes west 886 feet to a stake; thence north 77 degrees 34 minutes west 528 feet to a stake; thence south 1376 feet to the place of beginning.

The said tracts of land are bounded south by the Rio Grande River; east by said river or the banks of the old channel of said river; and on the west by what is known as Magoffin's Addition to the City of El Paso; and on the North by what is known as the Texas & Pacific Railway reservation or right of way.

It is the further order, judgment and decree of the Court that the said plaintiff, Walter B. Grant, as sole independent executor of the last Will and Testament of Frank B. Cotton, deceased, and as sole, surviving trustee and residuary legatee under said Will, (his co-executor, Wm. C. Cotton, having died since the institution of this suit, and the said Walter B. Grant having succeeded to all of the rights of the said Wm. C. Cotton, under the Will of Frank B. Cotton, deceased, and all rights of the said Wm. C. Cotton in the land, premises and subject matter in controversy, the said Walter B. Grant has been authorized to prosecute this suit alone) do have and recover of and from the said defendant, Candelaria V. de Cordova, all costs in this behalf incurred, for which execution may issue; and that he have his writ of possession for the above described land and premises and that he have such other and further writs and processes as are meet and proper in the premises, and such as are necessary to give full force and effect to this judgment.

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It is the further order, judgment and decree of the Court that the defendant, Candelaria V. de Cordova, take nothing by her
28 plea of limi-ation or her plea for valuable improvements herein.

It is the further judgment of the Court that the plaintiff do not recover of the defendant or the sureties on her replevy bond any rents or damages.

(Endorsements:) No. 479*b* (C. C.). United States District Court, Western District of Texas, El Paso Division. Walter B. Grant, Exr. vs. Candelaria V. de Cordova. Judgment. Filed and entered, Oct. 5, 1916. D. H. Hart, Clerk, by S. L. Kelly, Deputy.

29 In the District Court of the United States for the Western District of Texas, El Paso Division.

No. 479B.

WALTER B. GRANT, Independent Executor and Trustee of the Estate of Frank B. Cotton, Deceased,

v.

CANDELARIO V. DE CARDOVA.

Defendant's Bill of Exceptions.

First Exception.

Be it remembered that on the 2nd day of October, 1916, the above numbered and styled cause came on to be heard before the Honorable Gordon Russell, District Judge of the Eastern District of Texas, holding court at El Paso in the Western District of Texas, by lawful designation to hold said court, and the plaintiff appeared by his attorneys, Messrs. Beall, Kemp & Nagle and Turney & Burges, and announced ready for trial, and the defendant appeared by her attorney-, F. G. Morris and B. Bryan and declined to announce for trial, but presented her plea to the jurisdiction of this Court to try this cause, which plea is a part of the record, and thereupon the plaintiff presented to the court his demurrer and exceptions to said plea, and the court having heard said plea and the said demurrer and exceptions, made its order sustaining said demurrer and exceptions, which order is of record in this cause, to which order and ruling the defendant then and there in open court excepted, and hereby tenders this her bill of exceptions, which is allowed and signed.

In sustaining this demurrer it was agreed by plaintiff and defendant that the court would take judicial cognizance of the agreement as to the United States, the State of Texas, and the City and County of El Paso exercising jurisdiction over the property, and the correspondence and letters between the Secretary of State,
30 Mexican Ambassador, and Keblinger, certified to by the State Department, and the opinions of the Boundary Commission

and the action of the United States thereon; all of which were afterwards introduced in evidence.

Second Exception.

That thereupon the defendant, still protesting against the jurisdiction of the court, the court directed that the trial of the cause be proceeded with, and a jury having been impaneled and the pleadings, other than the said plea having been read to the court and the jury, the plaintiff read in evidence the following patents from the State of Texas, to-wit:

No. 92, No. 589, Vol. 2:

To all to whom these presents shall come, Know Ye I, R. R. Runnels, Governor of the State aforesaid, by virtue of the power vested in my by law, and in accordance with the laws of said State in such case made and provided, do by these presents grant to James W. McGoffin, Assignee of N. W. Burditt, his heirs or assigns forever, Three hundred and twenty acres of land, situated and described as follows: In El Paso County on the East bank of the Rio Grande, about 3 miles below El Paso, and known as Survey No. 1, in Section No. 1, by virtue of Donation Land Warrant No. 463 issued by the Adjutant General on the 6th day of December, 1852, and transferred by said Burditt to J. L. Aukrim on the 6th day of December, 1852, and by said Aukrim transferred to James W. McGoffin on the 25th day of June, 1853, and in accordance with the provisions of an Act of the Legislature, approved 21st of January 1854.

Beginning at a stake on the East Bank of said River 346 varas East and 504½ varas South from an Astronomical point, determined by Lieut. A. W. Whipple, U. S. Top. Engineer, associated with the Mexican Boundary Commission at Magoffinville in N. Latitude 30 degs. 46′ 5′ 5/10 and West Longitude from Greenwich 106 degs. 21′. Thence North 2600 varas to a rock mound. Thence
31 West 672 varas to a rock mound. Thence South 2776 varas to a stake on the bank of the River. Thence down said river with its meanders to the place of beginning.

Hereby relinquishing to him, the said James W. McGoffin, and his heirs and assigns forever, all the right and title in and to said land heretofore held and possessed by the said State; and I do hereby issue this Letter Patent for the same.

In testimony whereof I have causd the Seal of the State to be affixed, as well as the Seal of the General Land Office.

Done in the City of Austin on the Twentieth day of February in the Year of Our Lord, One Thousand, Eight Hundred and Fifty-eight.

R. R. RUNNELS, *Governor.* [SEAL.]

S. CROSBY,
Commissioner of the Gl. Land Office. [SEAL.]

Filed for registration July 29th, A. D. 1871, and duly recorded July 29th, A. D., 1871.

No. 91, Vol. 2.

To all to whom these presents shall come:

Know Ye, I, H. H. Runnels, Governor of the State aforesaid, by virtue of the powers vested in me by law, and in accordance with the laws of said State, in such case made and provided, do by these presents grant to James W. McGoffin, Assee. of N. W. Burditt, his heirs and assigns forever, Three hundred and twenty acres of land situated and described as follows:

In El Paso County, on the East Bank of the Rio Grande, about 2½ miles below El Paso, and known as Survey No. 2, in Section No. 1, by virtue of Donation Warrant No. 463, issued by the Adjutant General on the 6th day of December, 1852, and transferred by Burditt to J. L. Aukrim on the 6th day of December, 1952, and by said Ankrim transferred to James W. McGoffin on the 25th day of June, 1853, and in accordance with the provisions of an Act of the Legislature approved 21st January, 1854.

32 Beginning at a stake the Southwest corner of Survey No. 1. Thence North 2368 varas to a rock mound. Thence West 672 varas to rock mound. Thence South 3008 varas to a stake in the bank of the Rio Grande. Thence down said River with its meanders to the place of beginning.

Hereby relinquishing to him, the said James W. McGoffin and his heirs and assigns forever, all the right and title in and to said land heretofore held and possessed by the said State, and I do hereby issue this Letter Patent for the same.

In testimony whereof, I have caused the seal of the State to be affixed, as well as the seal of the General Land Office. Done in the City of Austin on the Twentieth day of February, in the Year of Our Lord, One Thousand, Eight Hundred and Fifty-eight.

R. R. RUNNELS, *Governor.* [SEAL.]

S. CROSBY, [SEAL.]
Commissioner of the Gl. Ld. Office.

Filed for registration July 29, A. D., 1871, and duly recorded July 29, A. D., 1871.

In the name of the State of Texas to all to whom these presents shall come, know ye:

I, J. S. Hogg, Governor of the State aforesaid, by virtue of the power vested in me by law, and in accordance with the laws of said State in such case made and provided, do by these presents grant to W. B. Merchant and B. G. Thomas, their heirs or assigns forever, One hundred and fifty-eight (158) acres of land, situated and described as follows:

In El Paso County, being Survey No. 21, on the waters of the Rio Grande, about 1½ miles S. E. from El Paso, said land having been purchased and fully paid for in accordance with an act approved March 29th, 1887, Chapt. 80, Page 61, Genl. Laws.

Beginning at a stake and mound standing on the East line of the N. W. Burditt Sur. No. 2, and on the South bank of the
33 Rio Grande, said stake and mound being 3060 varas due South from the N. E. corner of said N. W. Burditt survey No. 2. Thence with the East line of said Burditt survey No. 2 South 1418½ vrs. to a stake standing on the North bank of said Rio Grande. Thence down and along said Rio Grande the following courses and distances to wit: N. 85½ deg. E. 60 vrs. N. 59 degs. 35′ E. 300 vrs., N. 54 degs. E. 300 vrs., N. 42½ degs. E. 200 vrs. N. 33½ E. 180 vrs. N. 14 degs. E. 80 vrs. N. 1 deg. W. 180 vrs. N. 15 degs. 20′ W. 160 vrs., N. 25½ degs. W. 300 vrs. N. 49¾ degs. W., 100 vrs., N. 68 degs. W. 60 vrs. and N. 85½ degs. W. 514.2 vrs. to the place of beginning.

Hereby relinquishing to them, the said W. B. Merchant and B. G. Thomas, and their heirs and assigns forever, all the right and title in and to said land heretofore held and possessed by the said State, and I do hereby issue this letter patent for the same.

In testimony whereof, I have caused the seal of the State to be affixed, as well as the seal of the General Land Office.

Done in the City of Austin, on the Eighteenth day of August, in the Year of Our Lord, One Thousand eight hundred and ninety-four.

J. S. HOGG, *Governor.* [SEAL.]

W. L. McGAUGHEY, [SEAL.]
Commissioner of the General Land Office.

Filed for record September 6, 1894, and recorded September 6, 1894.

And plaintiff then read in evidence the following stipulation of the parties to this suit:

It is agreed that the plaintiff shall offer in evidence without objection the patents to the N. W. Burdett Survey Number One, N. W. Burdett Survey Number Two and the Merchant and Thomas Survey, duly filed in this cause, and that by the terms of said patents and each of them from the State of Texas and all of the
34 mesne conveyances, including the conveyances to the plaintiff, the Rio Grande River is called for as the Southern boundary of said surveys and each of them; and that plaintiff has title to the Burdett Surveys Nos. 1 and 2 under said patents and the mesne conveyances, and to all land, if any, which in law under the facts belongs to said surveys or either of them by accretion, defendant not admitting there is any accretion thereto; and that the land described in plaintiff's petition lies between the said East line of Survey No. 1 and the West line of Burdett Survey No. 2,

and the Northern boundary of said Surveys Nos. 1 and 2 and the present channel of the Rio Grande.

And it is further agreed that the defendant, Candelario V. de Cordova, now has possession of a part of the land described in plaintiff's petition, and that all of the land of which the defendant, Candelario V. de Cordova, has possession, which is described in plaintiff's petition, lies between the present channel of the Rio Grande River, and the channel of the said Rio Grande River as it existed in 1852, and that such portion of said land as defendant has possession of lies between the Northern Boundary of said N. W. Burdett Survey No. 2 and the present channel of the Rio Grande River.

That the United States, the State of Texas, County of El Paso and City of El Paso are now and for many years past have been, and at the time of the institution of this suit and long prior thereto were, and ever since said time have been exercising and still are exercising government control and political jurisdiction over all of the property described in plaintiff's petition; and that the United States of America and the State of Texas have enforced their laws during said time upon all of said land, and have punished and still punish offenders for violations of said laws.

Whereupon the plaintiff rested, and the defendant thereupon moved the Court to instruct the jury to return a verdict for
35 the defendant upon the ground that the field notes of neither of the surveys patented to N. W. Burdett were proved to embrace the land sued for and described in plaintiff's petition, which motion was by the court refused, and the defendant then and there excepted to such refusal to give such peremptory instruction, and hereby tenders this her bill of exception which is allowed and signed.

Third Exception.

And thereupon the defendant proceeded to offer in evidence her testimony as follows:

The defendant read in evidence the conclusions of the majority of the Boundary Commission acting under Treaty between the United States and Mexico of 1910, said decision having been rendered on June 15, 1911, to wit:

Conclusion of International Boundary Commission Award.

The Presiding Commissioner and the Mexican Commissioner consider that the changes referred to in this testimony can not by any stretch of the imagination, or elasticity of langauge, be characterized as slow and gradual erosion.

The case of Nebraska v. Iowa (143 U. S., 359) decided by the Supreme Court of the United States in 1892, is clearly distinguishable from the present case.

In Nebraska v. Iowa the court, applying the ordinary rules of international law to a fluvial boundary between two states, hold

that while there might be an instantaneous and obvious dropping into the Missouri River of quite a portion of its banks, and while the disappearance, by reason of this process, of a mass of bank might be sudden and obvious, the accretion to the other side was always gradual and by the imperceptible deposit of floating particles of earth. The conclusion was, therefore, that notwithstanding the rapidity of the changes in the course of the channel, and the washing from the one side onto the other, the law of accretion controlled on the Missouri River as elsewhere. In the present case, how-
36 ever, while the accretion may have been slow and gradual, the parties have expressly contracted that not only the accretion, but the erosion must have been slow and gradual.

The Convention of 1884 expressly adopts a rule of construction which is to be applied to the fluvial boundary created by the treaties of 1848 and 1853, and this rule is manifestly different from that which was applied in the case of Nebraska v. Iowa, in which the court was not dealing with a special contract. If it had been called upon, in the case just cited, to decide whether the degradation of the bank of the Missouri River had occurred through a slow and gradual process, the answer would undoubtedly have been in the negative.

In the case of St. Louis v. Rutz (130 U. S. 226) the Supreme Court of the United States, dealing with facts very similar to those established by the evidence in the present case, found that the washing away of the bank of the Mississippi River did not take place slowly and imperceptibly, but on the contrary the caving in and washing away of the same was rapid and perceptible in its progress; that such washing away of said river occurred principally at the rises of floods of high water in the Mississippi River, which usually occurred in the spring of the year; that such rises or floods varied in their duration, lasting from four to eight weeks before the waters of the river would subside to their ordinary stage or level; that during each flood there was usually carried away a strip of land from off said river bank from 240 to 300 feet in width, which loss of land could be seen and perceived in its progress; that as much as a city block would be cut off and washed away in a day or two, and that blocks or masses of earth from ten to fifteen feet in width frequently caved in and were carried away at one time.

If the degradation of the bank of the Mississippi River, above described, was found by the Supreme Court not to be slow and imperceptible progress, it is difficult to understand how the destruction of land, houses and forests, described by the witnesses in the present case, can be regarded as samples of slow and gradual erosion.
37 Now can the presiding Commissioner and the Mexican Commissioner give effect to the contention that Mexico must be held to have put a construction on the words "slow and gradual" in the preamble of the Banco Treaty of 1905, which adopted the report of the Commissioners, stating that the changes producing the bancos were due to slow and gradual erosion coupled with avulsions, although it is alleged by the United States that the erosion in that case was even more violent than that which occurred at

the Chamizal. The report rendered by the Commissioners to their respective governments in no way discloses any facts tending to show the nature and extent of the erosive changes, and properly so, because that was not material to the question to be decided. It is true that, by making a minute examination of the plans accompanying the report, the actual extent of the erosive changes might have been ascertained, but there certainly was nothing in the question submitted to the governments for solution to necessitate or even suggest such an inquiry.

It has also been contended on behalf of the United States that before the signing of the treaty of 1905, the Mexican Government had received the opinion of the American Commissioner in the Chamizal case, which asserted that if the erosion in the Chamizal was not slow and gradual, then a fortiori the erosion which had formed the bancos in the lower part of the river could not be slow and gradual.

The effect of this assertion on the part of the American Commissioner, however, was counteracted by the reply of the Mexican Commissioner, who argued that there was no similarity between the two cases, and no inconsistency between his report on the bancos and his attitude in the Chamizal case. Under these circumstances, it is reasonable to conclude that the Mexican Government adopted the view of their Commissioner, and, in any event, it can not be successfully contended that in assenting to the language of the preamble to the Banco Treaty it was precluded from contending that
38 the Chamizal case was of a different nature.

It has been suggested, and the American Commissioner is of opinion, that the bed of the Rio Grande as it existed in 1864 before the flood, can not be located, and moreover that the present Commissioners are not authorized by the Convention of the fifth of December, 1910, to divide the Chamizal tract and attribute a portion thereof to the United States and another protion to Mexico. The Presiding Commissioner and the Mexican Commissioner can not assent to this view and conceive that in dividing the tract in question between the parties according to the evidence as they appreciate it, they are following the precedent laid down by the Supreme Court of the United States in Nebraska v. Iowa above cited. In that case the court found that up to the year 1877 the changes in the Missouri River were due to accretion, and that in that year the river made for itself a new channel. Upon these findings it was held that the boundary between Iowa and Nebraska was a varying line, in so far as affected by the accretion, but that from and after 1877 the boundary was not changed, and remained as it was before the cutting of a new channel. Applying this principle, mutatis mutandis, to the present case the Presiding Commissioner and the Mexican Commissioner are of opinion that the accretions which occurred in the Chamizal tract up to the time of the gr-at flood in 1864, should be awarded to the United States of America, and that inasmuch as the changes which occurred in that year did not constitute slow and gradual erosion within the meaning of the Convention of 1884, the balance of the tract should be awarded to Mexico.

They also conceive that it is not in their province to relocate that line, inasmuch as the parties have offered no evidence to enable the Commissioners to do so. In the case of Nebraska v. Iowa, the court contented itself with indicating as above stated, the boundary between the two States and invited the parties to agree to a designation of the boundary upon the principles enunciated in the decision.

The American Commissioner dissents from the above holding for the reasons given in his subjoined memorandum, and is of
39 opinion that all the changes which have taken place at the Chamizal since 1852 were due to slow and gradual erosion and deposit of alluvium within the meaning of the Convention of 1884.

He is further of opinion that the Commissioners have no jurisdiction to separate the Chamizal tract, and award a portion to the United States and a portion to Mexico, and in view of his conviction that the river bed in 1864 can not be ascertained, he considers that the award of the majority of the Commissioners can not be made effective.

Wherefore the Presiding Commissioner and the Mexican Commissioner, constituting a majority of the said Commission, hereby award and declare that the international title to the portion of the Chamizal tract lying between the middle of the bed of the Rio Grande, as surveyed by Emory and Salizar in 1852, and the middle of the bed of the said river as it existed before the flood of 1864 is in the United States of America, and the international title to the balance of the said Chamizal tract is in the United States of Mexico.

The American Commissioner dissents from the above award.

El Paso, fifteenth June, 1911.

A. LAFLEUR.
ANSON MILLS.
F. B. PUGA.

The defendant then adduced testimony as follows:

W. J. WARDER, a witness for the defendant, testified as follows:

I will be 85 years of age on the 18th of next December. I reside in El Paso, Texas, and have lived here since the 25th day of May, 1895, except a little while that I was in California when I was hurt. I knew Pablo Cordova in his life time and his wife Candelario Cordova. I knew where they resided during the life time of Pablo Cordova, and it is at the same place where the defendant lives now. I had contractual relations with Pablo Cordova in his life time,
40 and I got possession of some title papers that he had. I could not remember the papers I got from Cordova without something to assist me; I could not remember the names. They were in Spanish. I remember the name Telles was in the papers, and I remember the name Lucero in the papers, and I remember the name Jose Maria Cordova was in the papers. I remember that the name Hiliaro Avalos was in the papers. I remember those papers. I gave them to Mr. Owens and he put them on the map. I remember a paper that *that* the name Perfecto Avaloa in it. I gave all those papers to Mr. Owens and he put them on the map. Mr. Owens was a

surveyor and the man who made the map you have here. I was over the ground that the papers described. I went over the lands described in the papers when the map was made, and I went over the ground before the map was made and we surveyed the ground. We surveyed all three of the tracts. They lay around where the defendant now lives. She lives right in the midst of the land we went around. Where she lives is a point of the land. If she lives on one tract, the others adjoin it. As soon as the map was made I delivered the papers that Pablo Cordova gave me to Brewster Cameron. Brewster Cameron was living in New York at that time. He is dead. We went over Niagara Falls and was drowned. I first knew Pablo Cordova in 1895, and he was in possession of the land described in the title papers I have mentioned at that time, and there was nobody living there but him. He died on that land. I do not remember exactly when Pablo Cordova died. When he was going to die he sent for me and I sent Dr. Thompson to see him, and when the doctor got there he was dead. I believe he died not far from 1908. He lived on the land from the time I knew him in 1895 up to the time of his death, and his widow Candelario Cordova has lived there ever since. They did go to Las Cruces. That was about the time he turned the property over to me, and that was about the 1st of May, 1895. It was just after I came here in 1895. Let me see,—no, it must have been about 1897 that he turned the papers over to me and went to Las Cruces with his family. I don't remember just how long they stayed. My memory for dates is not very good. I have a diary that would tell, but it is at home in my trunk. I believe they
41 were gone to Las Cruces about a year. During the time they were gone the property was in my charge. I had a man named Cana on the property. They put it in my charge and I turned it over to Ramon Cana to take care of it, and he and his family went on the property, and when Pablo Cordova got back, Cana was still there, and Cordova went in another house. He built another house. Some of the houses were washed away by floods, No, I am wrong about that. I don't think he had but one house on it before the flood, and he built another house after the flood and they are living in that house now. Pablo Cordova and his family were living there when he died, and his widow and children have lived there since he died all the time.

Cross-examination:

I speak some Spanish. I just have a smattering of it, just enough to buy and sell wood or something of that kind or trade horses or sell horses. All I know is what I use when I buy and sell horses and sell wood. I use Spanish in buying and selling horses and in loading and shipping wood. I can not carry on a conversation in Spanish. I could read and understand the papers I mention, although they were in Spanish. I could read the Spanish and understand the Spanish written in the title papers. All I remember about the papers is that I had them and had a map made and gave Mr. Owens the deeds and he placed them on the map. My memory is not as good as it was when I was younger. I did not read the contents of the instruments

Pablo Cordova gave me. I was interested in the Chamizal track. I have a personal interest in the result of the Chamizal controversy. I don't know that Pablo Cordova went to Ysleta instead of Las Cruces. He left for Las Cruces. I think he was on the land when I came here, and after that he went up to Las Cruces and stayed there a short time and came back. I don't know that he ever lived in Ysleta, and I don't know that he went there about 1898. I never heard that he ever lived at Ysleta, but he might have done it at some time.

42 I knew him all the time after 1895. I could not tell exactly when he died, but when he went to die he sent for me. I think he died something like 1908. I don't remember dates very well. I kept diaries of dates and never had to tax my memory with them. I got hurt the day I was 80 years old. I fell down at the Sheldon and got hurt, and after that time I never kept a diary up, but I did keep one up to that time. I have not consulted the diary about these dates.

Redirect examination:

I stated that Pablo Cordova lived on this land before his death and that his wife lived there after his death and lives there now. They lived there and had chickens and a garden there. They did not cultivate much of the land, but they had tenants on it. They had a little house built up near the railroad track and she collected the rents. They had chickens there and cultivated some of the land, Pablo before he died and his wife since. One of Cordova's sons cultivated some of the land and Cana cultivated some of the land. He is the man I put in possession of the land while Cordova was at Las Cruces. He died there.

R. J. OWENS, a witness for the defendant, testified as follows:

My name is R. J. Owens and I am a civil engineer. Mr. Parker and I made a map of the various tracts of land in what was known as the Chamizal District. The map you show me is the work we did. The names on the map are the names that were embodied in the papers given us, the ones from the Mexican Government, not the ones from the individuals. I don't remember whether they had been transferred or not. There were a lot of deed- handed to us in Spanish by Mr. Bennett, but whether the grantor was the Government of Mexico I don't remember. The names that appeared in what purported to be title papers were put on the map, and that was all we had to go by. I think we sketched the channel of the river of 1852 on there. I did not know the field notes of the Emory and Salazar survey at that time.

43 Defendant introduced in evidence delineation of the map according to Emory and Salazar which was used in the Report of the Boundary Commission, showing the Rio Grande as it was in 1852, and according to *say* map it was conceded that the channel of the Rio Grande as it ran in 1852 is North of the premises now occupied by defendant.

The witness being shown the map made by Emory and Salazar and the map made by Parker, further testified:

The Texas & Pacific Ry. is shown on the Parker map, but I could not say where the smelter would be because it is not on the map made by Mr. Parker and myself. The smelter could be some distance south of the channel of the river of 1852. It lies about the bend or curve of the Texas & Pacific Ry. where it curves northward, and just south of the Texas & Pacific Ry. track. Approximately from the scale of the map I judge the smelter would be 50 to 100 feet south of the Texas & Pacific Ry. track. This is a lithographed map and it would not show the scale indicated on the other map. This map is smaller in scale than the other. You can always make a scale to fit most any map.

Cross-examination:

The map was sketched out by Parker and myself from some papers translated into English and furnished us for that purpose. H. F. Bennett furnished us the translated papers. I do not personally know what they were translated from. We were first handed a quantity of Spanish papers which we could not handle. We did not understand the Spanish language. I did not understand what they were. They were taken up and translated. I could not say whether what was handed us was a translation of the papers or not, for I could not read Spanish, but we put in the map the English papers handed us. I could not read Spanish well enough to compare the papers. That map was made up from the English papers furnished us. I was not trying to put them in by natural ob-
44 jects on the ground. There was some surveying done, a little. The separate tracts were put in without survey, but there was some surveying done, but there was no surveying for the separate sketches. Of course the surveying had to do with some of the tracts in an indirect way.

Redirect examination:

You now hand me a map of the City of El Paso with sketches made on top of it. It does not show the separate tracts like the one made by myself and Parker. It shows all the lots and blocks of the City. It shows the lower part of El Paso and shows the Cotton Addition, and that addition is laid out in lots and blocks. I have seen the little smelter when it existed there. The smelter seems to have been in a location near to Block 44 of the Cotton Addition designated on the map. I- would be on either 44 or 45 of the Cotton Addition.

Recross-examination:

A part of this map appears to have been made by me, for I recognize my writing, but the larger colored ink part is not my work. The blocks and streets are made from the standard City map. It has been a long time since I did that work. There seems to be a connection on this map with the southeast corner of Block No. 24. That

must be the Campbell Addition. That connection shows a line beginning 35 feet East from the Northeast corner of Block 24 and extending down and along Stanton Street in a Southerly direction 490 feet and then across to the East side of Stanton Street 35 feet, and then a line in a Southerly direction crosses Stanton Street bridge over to a point off here. The several tracts of land shown on the map were put on this map, which in other respects corresponds to the City map, by Mr. Parker and me. I refer to the small tracts indicated there. They were put in the map from descriptions given in the papers. We made it as near correct as we could. The courses were not given. They were not reliable courses.

45 Redirect examination:

It is a fact that most Mexican titles in this district are bounded by each other, and when you get one located, you locate one on another that way. The description will call for some other tract or a ditch or something of that kind. They can be located one by the other or by a ditch or something they called for.

Recross-examination:

The calls we had in the translations did not give the course and distance. As a matter of fact in Mexican surveys when they call from north to south or east to west, we do not know whether it is due north and south or due east and west.

Redirect examination:

We have one survey for a beginning and the others are constructed on it. That was the plan in constructing that map.

VIRGINIA MONTEZ, a witness for defendant, testified through an interpreter as follows:

I live in Juarez. I knew Pablo Cordova in his life time. I know his wife Candelario Cordova. I knew Mr. Cordova over thirty years and I have known Mrs. Cordova since she married Mr. Cordova.

Defendant introduced in evidence certified duly authenticated copy of the return showing the marriage of Pablo Cordova and Mrs. Candelario Luna issued on the 13th of September, 1890, and the return showing they were married on the 15th of September, 1890.

I don't know just how long I knew Pablo Cordova before he married Candelario Luna, but it was a great while, a long time. I am 64 years of age. I know where Candelario Cordova now lives. I don't know the street she lives on, but I know the house. It
46 is on this side of the river. I have never been married. The land once belonged to my mother, that is, the land where Mrs. Cordova now lives. My mother's name was Refugio Morales. I know of my mother signing a deed or paper to the land. I did not sign the paper along with my mother. My mother signed the paper

in favor of Pablo Cordova. She turned over to Pablo Cordova lands that had been put on this side on account of the change in the river. This is the same land where Candelario Cordova now lives. I know from whom my mother got that land. She got it from Jose Morales. I do not remember the name of the person from whom my father and mother got the land, but it is on the papers, on the deeds. It has been so long I could not remember the names of any of those persons. I did not know Maria Rosa Telles nor did I know Cano Lucero, Mariano Lucero, Francisco Lucero and Nicolas Lucero. I knew Jose Maria Cordova. He lived near my mother's land, but I don't know just where. I believe the land he lived on adjoined the land my mother sold to Pablo Cordova. I could not state how long he lived there. I think he lived there over forty years. I knew Manuel Cordova. He lived on the land that Jose Maria Cordova lived on. He lived there perhaps thirty years. I knew Hiliaro Avalos. I don't know whether he ever lived on the Cordova land, but he lived in that neighborhood. I don't know how long he lived there, but may be 20 years. I did not know Perfecto Avalos. My mother did not live on the land that she sold to Pablo Cordova, but she cultivated it, perhaps forty years. Pablo lived there from the time he bought the land; he lived there continuously. He was working the land while he lived there. He cultivated the land; he cleared the land. Since he died his wife and family have been living on the land. As far as I know, I think Pablo Cordova had two children, Adolpho and Jose. They lived there after the death of their father with their mother. They have lived there from the death of their father to the present time.

47 Cross-examination:

I am 64 years of age and was born in Juarez, and have lived there all my life. I believe my mother transferred this land to Pablo Cordova in 1888. My mother cultivated the land before she sold it. My mother lived in Jaurez and she cultivated the land when it was on the other side of the river and after it was on this side of the river. I don't remember the year that it got from the other side of the river to this side. When my mother transferred the land to Pablo Cordova I think he was living at Bosque Acco, which is on this side of Las Cruces. As I remember it, that was in 1888; I am not certain, but I believe that to be the date. I don't know what relation Jose Maria Cordova is to Pablo Cordova. I don't know whether they are related to each other or not. Jose Maria Cordova is dead; he died a great many years ago, but I could not state the year. I believe it was over 30 years ago. Manuel Cordova is dead. He has been dead about 20 years. His father died before he did. I could not say when Pablo Cordova died, whether it was 20 or 30 years or how many; I think it was less than 20 years ago. May be it was 15 years and may be less, I don't know. I don't know what year the railroad got to El Paso. I don't remember the date that the bridge was built across the river between Jaurez and El Paso. My mother sold the land to Pablo Cordova after the railroads came.

It has been a long time since I was to the land that my mother sold to Don Pablo; I don't remember the date; I used to go there to visit. I was there may be eight days ago, may be less. I always go there when I feel like going; I don't remember the dates nor how often. When I said I had not been there for a long time I meant I did not go to the land, but to this lady's house. I believe the house is on the land my mother sold; I believe it is the same land.

ORACIO OTERO, testified for the defendant through an interpreter as follows:

I am a son of Candelario Cordova. Pablo Cordova was
48 not my father. I was born before my mother married Pablo Cordova. I am 36 years old. My mother married Pablo Cordova in 1890. At the time they were married my mother and I lived at San Ignacio in Old Mexico about 30 miles from El Paso. We did not live there after they were married; we came away right then, and have been living since where my mother lives now. My mother is now living on the land that this suit is about. From 1890 Pablo Cordova and my mother continued to live where my mother now lives until he died, and she has lived there since he died. They went to Las Cruces for a short time. I guess they lived here about eight years before they went to Las Cruces. We lived at Las Cruces about five years, and came back here about 1902, I guess. Pablo Cordova died in 1904. Since we came back from Las Cruces my mother has been living right where she now lives. Pablo Cordova and my mother used to farm this land all the time; they used it for a farm every year and worked it every year. While we were at Las Cruces Pablo Cordova had some one in charge of the place, but I don't remember the name of the person. Pablo Cordova had five children by my mother after he married her; two are living and the others are dead. They died without being married. The ones living are Adolpho Cordova and Jose Cordova, and they are the only living children of Pablo Cordova. The other two died in infancy.

Cross-examination:

We were living at San Ignacio when my mother married, and they came to El Paso to get married. After they were married we went to live at the place where my mother now lives. My step-father had a house there and we moved into the house to live. My mother does not live in that house now, but in another house. The flood of 1907 washed away the house where we first went to live. In 1902 they lived at this place, and went to New Mexico before that time and came back in 1902. They went to Las Cruces and stayed
five years and came back here in 1902. When we came here
49 to live after my mother married there was a man named Ramondo Cano lived on the place. Cano has been off the place a long time. Different people have lived there who have been renting the place from my mother. This family named Cano loved

there while we were in New Mexico. We did not find them there when we first went there to live, but they were there when we came back from New Mexico. In 1890 when we went there to live the first time Cano was not living there. When we went there after my mother was married I think there was one or two other families on the place, but they moved off. Mr. Cordova was the only one who claimed land there. Ramondo Cano stayed on the place while we were in New Mexico. There was a fellow named Gordon who used to rent some property from my step-father. He is not there on the land now. Cano and Gordon were both put off the land by the officers. Cano and Mr. Warder looked after the land while we were in New Mexico. Nobody else looked after it.

JOSE CORDOVA, a witness for the defendant, testified as follows:

I am a son of Pablo Cordova and Candelaria Cordova. I am 21 years of age, and reached my 21st birthday the 15th of last May. I am living with my mother on the land this suit is about. I was born there and have lived there all my life. I was old enough to remember when we went to Las Cruces. We lived there I think about five years. I don't remember the date that we got back to this property in litigation. I think we got back about 1901 as near as I can remember. We have been farming the property every year. My mother and brother Adolpho have lived on the property and farmed it every year. We farm about 40 acres. We have been there and have been farming it every year since we came back from Las Cruces.

Cross-examination:

I did not say that we went to Las Cruces to live in 1901, but that we came back here in 1901. We had been away I think about
50 five years. We did not live at Ysleta. My father never did live there.

ADOLPHO CORDOVA, a witness for the defendant, testified as follows:

I am a son of Pablo Cordova. I live with my mother on the land in litigation in this case. I am 24 years old. I was born on the place where my mother now lives. I remember when we went to Las Cruces. That was in 1896. We lived there five years and then returned to the place involved in this suit in 1901. Mr. Warder was in charge of the proper- for my father while we were gone. He had Louis Gordon cultivating it while we were away and also Ramonda Cano. They stayed there on the land until we came back. I did not come back to the place while we lived at Las Cruces, but my father did. I don't know who stayed on the place while we were away, except my father had those two men in charge of it, and they were there when we came back. When we came back we farmed the place. We farmed 25 acres every year. My father up to the time of his death lived there, and my mother and brother and I have lived there since my father died. My father died in 1904.

PABLO G. TELLES, testified through an interpreter, for the defendant, as follows:

I was acquainted with Don Jose Morales; he was my grand-father. I don't remember exactly when he died, but I think it was about 1845. I did not know Felipe Lucero. I could not say whether Jose Morales was related in any way to Maria Rosa Telles. I do not know what relationship Cano Lucero, Mariano Lucero, Francisco Lucero and Nicolas Lucero were to Maria Rosa Telles. I was too young then to know. I could not tell whether the Lucero people were related to me. I know that Refugio Morales Montes owned land and sold it to Pablo Cordova. She held possession of the land from the
51 death of Jose Morales until it was sold to Pablo Cordova, which was several years, may be 20 or 30 years. Jose Morales had possession of the land before Refugio Morales Montes got it. I don't know how long he had possession of the land. In 1845 or 1849 I saw a good deal of the land because my father had a mill near by. Jose Morales had possession of it that far back and was farming it and planting it. After Refugio Morales and her husband convey it to Pablo Cordova he had possession of it up to the time of his death. Refugio Morales' husband occupied it and cultivated it. Jose Morales occupied it before he died. During the years I was around there he occupied it. He cultivated it and had a small house where he kept his tools and also a man he kept working there. That was continuously. There was some person there all the time. I know Jose Maria Cordova Juni-r and Jose Maria Cordova Senior. The old man had land near where Pablo was. I know land as the land of Jose Maria Cordova. He lived on his land and had a great deal of other property. The land he lived on was quite a distance from the land in this suit. I don't remember whether he had land adjoining Pablo Cordova's land or not. It was close to where Pablo lived. I knew Hiliaro Avalos before his death. He did not live on any of the land that Pablo Cordova afterwards held. I knew Manuel Cordova. I do not know of Pablo Cordova living at Las Cruces, but I know he lived at San Ignacio before he married. He lived in this land from the time he bought it from Refugio Morales until he died. When he lived at San Ignacio was before he bought this land. I live in El Paso now, and have lived here 16 years. I have my ranch in Jaurez and go there daily to work. I am 80 years and 8 months of age.

Cross-examination:

I did not say that Don Jose Morales once lived on the land that defendant now lives on. He had a man there; he had a hired man and some houses there where he kept his tools; one small house I know. At that time the river was north of that house. It was in Mexico. When Jose Maria Cordova lived there the land was
52 in Mexico, and now part of the land is on this side, the Texas side. The ruins of the house are still in Mexico.

LORENZO MONTES, a witness for the defendant, testified as follows:

I am 44 years old. I live in Jaurez, and was *burned* and raised there. I knew Pablo Cordova well. I knew Refugio Morales Montes. She was my mother. I know where Pablo Cordova lived at the time he died. My mother, Refugio Morales Montes once lived on the land where Pablo Cordova died; she lived there 30 years. She sold the land to Don Pablo Cordova and he went there to live at once, and he lived there until he died, and afterwards his family lived there. I do not know anything of his being absent for a while at Las Cruces.

Cross-examination:

I said that Refugio Morales Montes lived on the land for thirty years before she sold to Pablo Cordova. The river was south of the land at the time she lived there, and was south of it during all the time she lived there. The land was in Mexico and Mexican land. The river was running on the south side of the land. The river was running north and south and there was an island there. I did not mean the land was on the Mexican side when my mother lived there, for the river was south of it and it would be on the American side. The land was on the American side for the full thirty years my mother lived there. It was always on the American side, and the river was on the side of the land it is on now.

Redirect examination:

I don't know when the river went to where it is now; I don't know when it changed. I am 44 years old and I don't remember as far back as 852.

53 Recross-examination:

I did not state what year the land was sold to Pablo Cordova. I don't know what year it was sold. I know when the land was sold to him my mother had been living there 30 years. I know that myself. Don't know how old I was when the land was sold to Pablo Cordova. I was not a grown man at that time. I know that for thirty years before she sold to Pablo Cordova my mother had lived on the land. I had been seeing her there all that time.

H. W. PONTIUS, testified for the defendant as follows:

I am acquainted with the location of the land in controversy in this suit. I know where the slag pile is down there, and it is a slag pile that a smelter produced. That slag pile is just a little south of west of where the defendant lives. It is between a third and a half block south. It is 300 or 400 feet from her house, not over 400 feet.

Cross-examination:

I don't know that I am one of the owners of the Chamizal claim. I bought the interest of the boys. I know I have an interest in it. I bought the interests of Jose and Adolpho Cordova. I bought all

their interest in the land. Their mother has a life interest in a part of it.

Redirect examination:

My transaction about the land has been since the suit was brought. When I stated yesterday that the smelter was southwest of the house where defendant lives, I was mistaken about that, because if Seventh Street were extended on, it would strike the house. The smelter is north-west of the house provided the streets run east and west. I don't know how far it is from the house, but I judge about a block. I took the interest of the boys on a contingent fee in case the title
54 was good. I have not bought anything up to this time. I have been in the house they live in down there a number of times. I have had experience in the construction of adobe houses, and my judgment that house would be worth from $700.00 to $1,000.00 at this time. It would be pretty hard to say what the land would be worth without any improvements. I understand some of the cotton land leased for $5.00 an acre. The farm land that close to town without any improvements on it would be worth a thousand dollars an acre.

Recross-examination:

I know that some land in that vicinity -as sold as high as fifteen hundred dollars an acre. The boys made a trade with me that I was to pay the expenses of the litigation and the attorney's fees, and if I won the suit, I would give the*n* ten thousand dollars. The title is in me as far as they could grant it. If I establish the title, I take it.

Redirect examination:

I don't think I could hold the title if I did not pay for it.

Whereupon defendant rested her case, and the plaintiff adduced the following record evidence:

Plaintiff read in evidence original complaint of Frank B. Cotton, Trustee, v. Pablo Cordova in forcible entry and detainer proceedings, filed in the Justice of the Peace's Court December 20, 1889, and the final judgment on appeal to the County Court of El Paso County, Texas, rendered by said Court on the 10th day of July, 1891, adjudging the defendant guilty of forcible entry and detainer, and awarding the plaintiff a writ of restitution, and the writ and return thereon showing the ousting of said defendant from possession and delivery of possession by the officer to plaintiff, in July, 1891,
55 said proceedings embracing Blocks 206, 207, 208, 209, 210, 211 and 212 as designated on map of Cotton Addition to the City of El Paso, and being otherwise so described in said proceedings, as, together with the oral testomony showed that the proceedings embraced the lands now occupied by the defendant in this suit No. 479*b* in the United States District Court for the Western District of Texas, at El Paso.

Plaintiff, in addition to other instruments offered in evidence, offered the following:

A duly certified copy of a warranty deed from James W. Magoffin to Joseph Magoffin, dated September 1, 1868, acknowledged in the manner provided by law, and filed for record on January 10, 1869, and duly recorded the same day in Book B, page 11, Records of Deeds of El Paso County, Texas, which deed conveyed to the said Joseph Magoffin the following described land, to wit:

All that certain tract or parcel of land in the County of El Paso and State of Texas, being a tract of 960 acres, including the post known as Fort Bliss, less 200 acres, to be reserved as a homestead; also all other lands which the grantor, James W. Magoffin may be entitled to in the State of Texas.

A duly certified copy of a warranty deed from Dolores V. de Magoffin, widow of James W. Magoffin, to Joseph Magoffin, dated November 22, 1872, and acknowledged in the manner provided by law in force at the time of its registration, and filed for record in the office of the County Clerk of El Paso County, Texas, on November 25, 1872, and duly recorded the same day in Book E, page 59, Records of Deeds of El Paso County, Texas, said deed conveying all the right, title and interest of the grantor in and to that tract or parcel of land of 1280 acres, lying between the Cummings tract and the Ponce tract and on the East bank of the Rio Grande river, including the post known as Fort Bliss, which tract the deed recites was patented to the grantor's deceased husband, James W. Magoffin, in four several patents, numbered 585, 586, 588 and 589, and
56 being surveys numbered 1, 2, 3, and 4, issued to the said James W. Magoffin, on or about the 24th day of February, 1858, the deed also reciting that it gives and grants to Joseph Magoffin 200 acres reserved to the grantor as a homestead in said 1280 acre tract.

Also a warranty deed from Joseph Magoffin and wife, Octavia Magoffin, to Joseph Wilkins Tays, of date September 1, 1873, filed for record on October 3, 1873, and recorded on the same day, Book E, page 201, Records of Deeds of El Paso County, Texas, the said deed being acknowledged in the manner provided by the law in force at the time of its registration, and conveying to the said Joseph Wilkins Tays said N. W. Burdett survey No. 2, by metes and bounds the same as it is described in the patent to the said Burdett survey No. 2, issued to the said James W. Magoffin.

A duly certified copy of a warranty deed from Joseph Wilkins Tays, to James A. Tays, and John Tays, of date June 15, 1874, duly acknowledged in the manner provided by the laws in force at the time of its registration, and filed for record in the office of the County Clerk of El Paso County, Texas, on June 16, 1874, and recorded the same day in Book E, page 439, Records of Deeds of El Paso County, Texas, said deed conveying to the said James A. Tays and John Tays said Burdett Survey No. 2, by same description as contained in patent thereto, which was issued to the said James W. Magoffin.

Power of attorney from James A. Tays to John B. Tays, of date November 6, 1880, duly acknowledged in the manner required by the laws in force at the time of its registration, filed for record in the office of the County Clerk of El Paso County, Texas, on December 29, 1880, and duly recorded in Book H, on page 119½ and 120, records of Deeds of El Paso County, Texas, authorizing the
57 said John B. Tays to sell and convey on such terms and at such price as to him might seem meet, all lands, tenements and real estate of every character whatsoever, situated in the State of Texas which the said James A. Tays might own or be entitled to.

Original warranty deed from John B. Tays to Frank B. Cotton, for himself and as trustee for his associates, and for Noyes Rand, C. P. Ehrmann and R. W. Dorphley, of date January 12, 1881, and filed for record on February 2, 1881, in the office of the County Clerk of El Paso County, Texas, and duly recorded the same day in Book I, on page 136, Records of Deeds of El Paso County, Texas, said deed conveying to the said Frank B. Cotton, for himself and as trustee aforesaid, an undivided one-half interest in and to that certain tract or parcel of land situated in El Paso County, Texas, and described as follows, to wit: Beginning at a point in the East Boundary line of said survey, from which the astronomical point in the parade ground of Old Fort Bliss bears E. 326 vrs. Thence due North 1687½ vrs. to the Northeast corner of this survey; thence due West, regardless of piles of stones and monuments, 672 vrs. to Northwest corner of this survey; thence due south 4680 vrs. to Rio Grande River, Southwest corner of this survey; thence down the river 911 vrs. to Southeast corner of this survey; thence due North 2377½ vrs. to the place of beginning, containing 520.4926 acres, and known as survey No. 2, in Section No. 1, by virtue of Donation Warrant No. 463, issued December 6, 1852, to N. W. Burdett, and by him transferred the same day to J. L. Ankrim, and by Ankrim to J. W. Magoffin June 25, 1853, and patented to said Magoffin February 20, 1858, and by him conveyed to Joseph Magoffin and by him to Jos. W. Tays, and by him to James A. Tays and the grantor herein, by deed recorded in Book E, page 439, of El Paso County Deed Records.

Also a warranty deed acknowledged as required by law from James A. Tays to John B. Tays, his attorney in fact, to Frank B.
58 Cotton, as Trustee, for himself and associates, and for Noyes Rand, C. P. Ehrmann and R. W. Dorphley, dates January 12, 1881, filed for record on February 2, 1881, and recorded the same day in Book I, page 121, Records of Deeds of El Paso County, Texas, conveying to the said Frank B. Cotton, trustee as aforesaid, an undivided one-half interest in and to 520.4826 acres of land, by description the same as that given in the last above mentioned deed.

Plaintiff also introduced the dissenting opinion of General Anson Mills, the American Commissioner, rendered in the Chamizal Arbitration proceedings in June, 1911, the said dissenting opinion of the said American Commissioner being introduced in full, and the following being a portion of such dissenting opinion, to-wit:

"The American Commissioner concurs in the findings of the Presiding Commissioner to the effect that the Treaties of 1848 and 1853 did not establish a fixed and invariable line; that the Treaty of 1884 was retroactive, and in the finding of the Presiding Commissioner and the Mexican Commissioner to the effect that the United States has not established a title to the Chamizal tract by prescription. He is compelled to dissent in toto from so much of the opinion and award as assumes to segregate the Chamizal tract and to divide the parts so segregated between the two nations, and from that part of the opinion and award which holds that a portion of the Chamizal tract was not formed through 'Slow and gradual erosion and deposit of alluvium' within the terms of the Treaty of 1884.

The reasons for the dissent are three-fold: First, because in his opinion, the Commissioner is wholly without jurisdiction to segregate the tract or to make other findings concerning the change at El Chamizal than 'to decide whether it has occurred through
59 avulsion or erosion, for the effects of Article 1 and 2 of the Convention of November 12, 1884' (and Article 4, Convention of 1889). Secondly, because, in his opinion, the Convention of 1884 is not susceptible to any other construction than that the change of the river at El Chamizal was embraced within the first alternative of the Treaty of 1884. And, Thirdly, because, in his opinion, the finding and award is vague, indeterminate and uncertain in its terms and impossible of execution.

The award of the Presiding Commissioner and the Mexican Commissioner, constituting a majority of the Commission, is to the effect that the international title to the portion of the Chamizal tract lying between the middle of the bed of the Rio Grande, as surveyed by Emory and Salazar in 1852, and the middle of the bed of the said river as it existed before the *floor* of 1864, is in the United States of America, and the international title to the balance of the said Chamizal tract is in the United States of Mexico. (Opinion p. 36, supra, pp. 35-36.) The American Commissioner is of the opinion that this award is void, for the reason that *is* is equivocal and uncertain in its terms and impossible of accomplishment. The presiding Commissioner and the Mexican Commissioner 'conceive that it is not within their province to relocate the line (the line of 1864) inasmuch as the parties have offered no evidence to enable the Commissioners to do so' (Opinion p. 36, supra p. 35). It is submitted with all respect that the fact that the parties have offered no evidence of the location of the line of 1864 is suggestive of the fact that it was not within the contemplation of the parties that the tract should be divided. Perhaps the reason that agent and counsel on either side, even after the suggestion of the court as to the possibility of dividing the tract along the channel of 1864, did not ask leave to offer evi-
dence for the purpose of relocating this channel was because
60 they were and are well aware that it would be as impossible locate the channel of the Rio Grande in the Chamizal tract in 1864 as to relocate the Garden of Eden or the lost Continent of Atlantis.

In concluding this dissenting opinion, it is impossible to refrain

from poi-ting out the unfortunate results which this decision would have in the contingency that the two countries should attempt to follow it in interpreting the Treaty of 1884 in other cases.

The American Commissioner does not believe that it is given to human understanding to measure for any practical use when erosion ceases to be slow and gradual and becomes sudden and violent, but even if this difficulty could be surmounted, the practical application of the interpretation could not be viewed in any other light than as calamitous to both nations, Because, as is manifest from the record in this case, all the land on both sides of the river from the Bosque de Cordova, which adjoins the Chamizal tract, to the Gulf of Mexico (excepting the canyon region) has been traversed by the river since 1852 in its unending lateral movement, and the mass, if not all, of that land is the product of similar erosion to that which occurred at El Chamizal, and by the new interpretation which is now placed upon the Convention of 1884, by the majority of this Commission, not only is the entire boundary thrown into well night inextricable confusion, but the very treaty itself is subjected to an interpretation that makes its application impossible in practice and in all cases where an erosion movement is in question.

The Convention of 1910 sets forth that the United States and Mexico 'desiring to terminate the differences which have arisen between the two countries, have determined to refer these differences' to this Commission enlargd for this purpose. The present decision terminates nothing, settles nothing. It is simply an invitation for international litigation. It breathes the spirit of unconscious but nevertheless unauthorized compromise rather than of judicial determination."

61 Plaintiff adduced further evidence as follows:

NOYES RAND, testified by deposition for the plaintiff, as follows: (Deposition taken June 26, 1909.)

My name is Noyes Rand and I am 69 years of age. I reside at El Paso County, Texas, El Paso is my home. I never changed my residence. I first came to El Paso August 10, 1880, and I resided here until the last of January, 1899, and then I went to West Virginia and stayed for three years, but I never gave up my home in El Paso or voted anywhere else. I bonded the Cotton Addition property, and finally paid for it in the early part of January, 1881, and I moved on it immediately after that, and lived on it from the year 1881. In my former deposition I was of the impression that I moved off the property the latter part of October, 1898, but I have since discovered that the writ of sequestration was issued November 5, 1898, so that it must have been along between the 5th and the 20th of November, 1898 that I moved off the property. I know the Cotton Addition thoroughly. As before stated, I moved on the Cotton Addition in January, 1881, there being a house of about three rooms on the property at the time, I having added some six rooms on to the house after I began living there, and, as before stated, I lived there continuously

until between the 5th and 20th of November, 1898. I was well acquainted with Frank B. Cotton. I first met him in Boston, Mass., in 1879, where I made a contract with him to purchase mineral lands in the State of Texas, by which he was to furnish the money and I to buy according to my judgment, and he and his associates to have one-half of all profits, and me and my associates one-half. In the prosecution of this business in failing to find such mi-eral lands in the Eastern part of Texas, East of the Staked Plains as to justify me in a favorable report, I learned of vacant lands subject to entry upon railroad scrip in the County of El Paso. Upon reporting same, I was directed to buy railroad scrip and come to El
62 Paso and locate these lands, which I did to the extent in the neighborhood of about eighty or ninety sections. Whilst in El Paso my attention was called to this Cotton Addition and finally, after a trip East, and having bonded the property beforehand I was instructed to buy the same, and did so according to my answers before. Then I became the sole agent of the Cotton Addition, and you might say, resident partner at El Paso, Texas, the original contract having been modified to cover these City lands so that I and my associates would receive one-third of all profits to accrue, and Frank B. Cotton and his associates two-thirds. From that time on I held the Cotton Addition as the agent of Frank B. Cotton and associates and for myself and associates. I was Frank B. Cotton's agent representing his interests in El Paso County, Texas, from 1881 to 1898. While not his special agent from 1892, yet I represented all interested parties while I lived on the land, and looked after the property for all concerned until 1898. I resided on the Cotton Addition in the month of October, 1898, and was familiar with the condition of all the Cotton addition and every part of it. Before the year 1898, I had given a part of my interest in it to others, and owned at that time a small fraction more than one-ninth of the entire Addition, and this interest I had when I moved off the property about November 20, 1898. I have read the description of the property in the petition in this case, and it describes the Cotton Addition. There was nobody in October, 1898, residing on the property except as my tenant or with my permission. As before stated, I moved off the Cotton Addition about the 20th of November, 1898, I had a watchman on the property whose only rent was to advise me of any trespasser on the property; I had more than one watchman. These watchmen were located on different parts of the property, and they were required to cover the whole property every day. In case of trespassing, I immediately got rid of the party either legally or by force. Mr. Barela and Mr. H. S. Lyter will verify this statement of mine. I was familiar with the boundaries of the Cotton Addition and lived on it until November 20, 1898, and was managing the same for myself and my associate owners and all interested
63 parties.

Cross-examination:

This deposition was taken at my suggestion. I was summoned here from my native home in Charleston, West Virginia, for the

October Term, 1908, of the United States Court to testify in these cases. Failure to try the cases at that time, and the precarious state of my health, I suggested if they thought my testimony would be valuable to them, they had better take my deposition; that I was liable to drop off at any time from heart disease as did my father and grandfather before me.

W. J. RAND testified for the plaintiff as follows:

I am 44 years of age and have lived in El Paso since 1881. I am a son of Noyes Rand. When we came to El Paso we moved into an adobe house on the Cotton Addition. That house is right at the end of San Antonio Street just across Cotton Avenue. It is just north of the east and west tract of the T. & P. Railroad and west of the north and south tract. It is just north of the present terminal. I am in the street paving business and connected with the El Paso Bithulitic Co. I am President of the company. I lived there on the Cotton Addition with my father from 1881 to 1894. My father was still living there when I left home. I have been here in El Paso all the time since 1881. I know where the defendant is living now. I have seen the premises lately, From the early 80's up until 1887 or 1888 there was nobody living where she now lives. I was around the addition every day during that period, and in 1886, 1887 and 1888 I worked on the T. & P. when it was being built through here, and at that time this property was vacant and in the bosque and impossible of cultivation or anything. My father had charge of the Cotton Addition up to 1898, and he had men employed, a couple of Mexicans, who looked after it. He also gave it his personal attention. Was
64 there all the time except a couple of years he was back East. He was on the premises and in charge there up to the time Mr. Patterson took charge under the sequestration proceedings.

Cross-examination:

The earliest knowledge I had of the Cotton Addition was in 1881. At that time the river was south and east of it. At that time it was on the same side of the river that it is now. Since that time there has been a cut-off that makes the river run more south. I do not know when the land was divided in Blocks and Lots and Streets. I did not have charge of the business there at that time. My father and other persons had charge of it. I know the house where the defendant lives now. It was shown to me. I could not say how far southeast of the T. & P. track that is, but I judge three or four hundred feet. When I worked there for the T. & P. this land was grown up in thick timber. I was all over the land at that time, and if there had been a house there I would have seen it. We cut our wood out of that section when I worked for the T. & P.; we never had anything but tornea for wood in those days. There are some other houses in there higher up. If there was a house in there, it was built before 1887,—I mean after 1887, and I did not see one there before that time. I know the house was not there in 1887, but I don't know how long after that it was built.

Redirect examination:

Before 1887 I had been hunting up there as a boy; we built our fence on the west line of the Addition in 1888 I think, and that fence was built between the Cotton Addition and the Magoffin Addition. Up to 1887 there were no houses or improvements of any character on there.

65 Recross-examination:

The house that my father lived in was at the end of San Antonio Street. I think this Cordova place is about the end of 6th Street, about seven blocks from San Antonio Street. The house Noyes Rand lived in was seven or eight blocks from the house where the Cordovas lived.

J. A. SMITH, a witness for the plaintiff, testified as follows:

I live in El Paso, Texas, and have lived here 32 years. I was postmaster here about 13 years of that time. I am now President of the El Paso Valley Water Users Assn., and I was President of the El Paso Dairy until two or three years ago; I think it was incorporated in 1894. I hold in my hand a lease of the El Paso Dairy Co. of the Cotton Addition executed by Millard Patterson as Administrator of the Estate of Samuel Coit, and it reads as follows:

"This contract made and entered into this 17th day of April, 1899, between Millard Patterson, Administrator of the Estate of Samuel Coit, deceased, and the El Paso Dairy Company (a corporation) Witnesseth:

First. The party of the first part leases to the party of the second part, for the period of two years from this date, the following described property and premises, situated in the County of El Paso and State of Texas, to-wit:

All that portion of what is known as Cotton's Addition to the City of El Paso, Texas, described as follows:

Commencing at the Northwest corner of Block No. 42, according to the map of said Addition by which lots and blocks were sold in 1882, 1883, 1884, &c., running from thence Southerly with the East line of "A" Street to the canal of the El Paso Irrigation Company, thence along the line of said canal and along the West Bank of the river to the Easterly extremity of the South line of Pine Street, and thence Westerly with the South line of Pine Street to the place of beginning.

It is distinctly understood that this lease is made subject
66 to the rights of every individual who owns an interest in the Cotton Addition, and as soon as the litigation now pending respecting the Cotton Addition is at an end, or as soon as the respective interests of the various persons owning said Addition are established, determined or agreed upon, the lessees gerein shall recognize and they hereby agree to recognize all such rights as any person may legally assert in the premises.

Second. For and in consideration of the above premises, the party of the second part agrees to pay to the party of the first part the sum

of Fifteen Dollars per month to be paid as follows: $15.00 in advance on the 17th day of each and every month. The first month's rent being paid on delivery of this instrument.

Third. Should there at any time be*ing* any default in the payment of any rent due, or in any of the covenants herein contained, then it shall be lawful for the party of the first part to re-enter the said premises and remove all persons therefrom, without prejudice to any legal remedies which may be used for the collection of rent, all and every claim for damages for or by reason of said re-entry *eb*ing expressly waived.

Fourth. The party of the second part is not to sublet the said premises, or any part thereof, without written permission from the party of the first part. At the expiration of this lease the lessee may remove all buildings, etc., which it may have placed upon said property.

It is expressly understood and agreed by and between the parties hereto that the party of the first part shall have, and by this contract has, a valid first lien upon all the goods, furniture, chattels and property of any description belonging to the party of the second part as a security for the payment of all rent due or to become due.

Witness our hands this 17th day of April, 1899."

This lease took in everything from First Street to the Canal
67 and everything between the Canal and the Texas & Pacific Railway along there, and it covered the property where the defendant has her house now. There were no buildings or improvements where the defendant now lives at the time we took the lease, and there was no one living there at all. The dairy was located largely between First Street and Fourth Street. I had active charge of the dairy, and I was down there on the ground. I built a house there on the leased land and occupy the house yet. There was no one on the leased property when I went there. My recollection is that people first commenced coming in there on it about two years from the time I went there. That is when they began to squat on the property, which would make it about 1901.

FRANK EVANS, a witness for the plaintiff, testified as follows:

I live in El Paso and have lived here since 1886. In 1886 I lived in the Magoffin Addition to El Paso. My home was situated at the corner of Fifth and Tornillo Streets. That was right near the line of the Cotton Addition, just over the line on the Magoffin Addition. I lived west of the Cotton Addition. Sixth Street is one block south of Fifth Street. I know about where the house in which the defendant lives is located. I knew Pablo Cordova by sight. When I moved there in 1886 Pablo Cordova was not living where his wife now lives. There was no one living there at that time. To the best of my recollection Pablo Cordova came in there a couple of years after I went there, along about 1888, I think. He built his house, there,—that is a dwelling house, there was a little smelter there when he built. To the best of my recollection Pablo Cordova lived in the house he built there about a year or a year and a half. The

Sheriff then put him off, and as far as I know he remained off. Two parties occupied the house afterwards: they were Charles E. Sheffler and Mr. McCay. Sheffler was foreman of the smelter and McCay was a tanner. I know that Sheffler lived there as a tenant
68 and rented from Mr. Rand, but as to McCoy, I don't know what arrangement he had. I lived at the corner of Fifth and Tornea until 1897 when the flood came. The house that Pablo Cordova originally built fell down in the flood of 1897. It was an adobe house and it melted and fell down.

Cross-examination:

I went there in 1886 and Pablo Cordova built there in 1888 as near as I remember. His house washed down in 1897. I stated that Sheffler was a tenant of Noyes Rand. He told me so at the time. He stayed there five or six months. The other man was Hugh McCoy a tanner, and he was there when the flood came in 1897; he had been there quite a number of months then. I don't know how soon it was after Sheffler went out that McCoy came in there. It might have been five or six months or a year, I don't know. When Sheffler was there McCoy was not with him in the house; he was there alone. This man Sheffler occupied the same house that Pablo Cordova built. I do not know when Pablo Cordova lived at Las Cruces. He left there, but I don't know where he went to. I do not know how soon after the flood of 1897 another house was built there. I left that part of town, and was only occasionally down through there. I lived there up until 1897, and my house washed away and I left there. I don't know about the possession of the premises after 1897. Pablo Cordova did not tell me anything about his possession of the property or how he was claiming it. I did not have any conversation with him about it while he was in possession there.

Redirect examination:

Sheffler is in San Diego, Cal. McCoy is dead. At the time Pablo Cordova lived there the land was not fenced; there was no fence around it.

69 GEORGE H. SMITH, testified for the plaintiff, as follows:

I live in El Paso and have lived here about 29 years. I am a hostler for the El Paso Southwestern Railroad. I know where the defendant is living. She lives somewhere near Sixth Street on the Cotton Addition between the Canal and the Texas & Pacific Railroad and near the canal. I knew a man named McCoy, and I know him when he lived about the same place where the defendant now lives. I was interested with him in getting out caragro root for the tannic acid. It takes the part of oak bark in tanning. I was interested with him for eight months or a year. He was at that time living on this piece of land a little south of east of the old smelter. He was living at the place where the defendant is now living. I have been to his house when he was living there. He and I were experiment-

ing with the tannic acid. The flood occurred in 1897. The cut-off was built in 1899, I think. After the flood I had occasion to go over the ground where the defendant's improvements now are. We were in that immediate vicinity and suffered from the high water as well as other people, and I went down to see what they had done in regard to making the cut-off. By that I mean the new channel of the Rio Grande River made by agreement of the two governments, and it was for the purpose of straightening the channel down below this property. I went over the property and I went there especially for the purpose of seeing whether the high water had completely destroyed the improvements that McCoy had made there. I was interested with him at that time. That part of the country at that time was completely overgrown with willows and it was almost impossible to get through there. There was no house there of any description. After that I went down to see what they had done, and in the spring of 1900 I went back to see what the water had done, and to see whether the channel had been opened. I crossed the property in controversy in this suit, and there were no improvements at all there at that time.

70 Cross-examination:

The first time I went back there and looked over the property was in 1899 and the next time was in 1900. There was not anybody going into that part of the country for four years, and two years after that I saw the water backed up there again. The water stayed there long enough that if an adobe house was put up there, it would go down. When the water would be up in the spring, it would cover that land in there. It would be caused by a rise in the river. Three or four years after this there was another house put there by the Cordovas. When the cut-off was made, they commenced to come in there pretty thick. The cut off was made in 1899. After 1899 the locality was reli-ved of back water trouble, but I did not notice that people came in there for three or four years after that time. I said the water was backed up there so they could not do anything until 1899, and that for two or three years after that I did not notice anybody coming in there and settling. I said that adobe houses would not have stood there for two or three years afterwards and I meant by that a couple of years after the spring of 1897. I know there was a house there before McCoy went there. I am pretty positive that there was a house there before McCoy went there. As far as my knowledge goes that house was there two years or two years and a half before McCoy went there. I have been acquainted with that locality since 1893. I do not know that in 1889, 1890 and 1891 Pablo Cordova was living there, and I do not know that he was not living there during those years. I came there in 1893 and there was no house there in 1893. Of course in that vicinity I was not going over the country much on account of the high water. I did not observe whether there was a house there or not. I could not say *that* was not a house there in 1893. I could not say whether

there was a house there in 1894 and 1895. It was about 1895 that McCoy and I had the business there.

L. C. SMITH, testified for the plaintiff, as follows:

I am a brother of Geo. Smith the witness who was just on the stand. I have lived in El Paso 29 or 30 years. I know where
71 the property is located on which the defendant now lives. After the flood of 1897, I went down to see the cut-off after they got it finished. I think they finished it in 1899. I crossed this property, and I was with my brother, George Smith. There were no improvements on the property down there at that time. The Ground was grown up in underbrush. I crossed there subsequent to that time, and there was nobody there and no improvements there at that time. After the flood everything was washed away. I think the flood came in 1896 or 1897, and there was high water in there again the next year.

Cross-examination:

I don't know just how long the water stayed up in the rise of 1898. The water was all over the ground in that vicinity there. I could not say exactly how long the water stayed up in 1898. As near as I remember, the water stayed up two or three weeks in the rise of 1898. I did not go down there any more after that. When I went down there to see the cut-off was the last time I was there. I don't remember what year it was, but I was down there when the water *when* through the cut-off. Whatever year the cut off was made, I crossed the property the next spring.

DAN R. STEDHAM, a witness for the plaintiff, testified:

I have lived in El Paso since 1883. In 1900 I lived on Tornea and Th-rd Street near the Cotton Addition. I am familiar with the proper- the defendant lives on between the canal and the Texas & Pacific Ry. I was there and looked at it this spring. I was along at that place in 1900, and there were no improvements then at the place where the defendant now lives and had not been for about three years.

Cross-examination:

That was in 1900, and I knew nothing of it prior to that
72 time nor how long the Cordovas lived there. The last time I knew about it was about 1903. Cordova ultimately built there again and lived there, I think in the same house where the defendant now lives. I don't know when that house was put there.

GEORGE WAFER, a witness for the plaintiff, testified:

I live in El Paso and have lived here 26 or 27 years. I had a dairy near where Frank Evans lived. The dairy was on the Magoffin Addition. Tonea Street is east of the property on which I had the dairy,

and the cross street is Fifth Street. I know where the property is that the defendant claims, and it is east of the railroad between the railroad and the canal. I put the dairy there in the fall of 1891, and it remained*ed* there until the flood of 1897. During those years I had occasion to be over the ground where the defendant has her house, and I herded the dairy cows in there under the authority of Maj. Noyes Rand. During that time there was a little smelter on this land, but I don't remember the name of it, I believe they called it the International smelter, and there was an adobe house over there which was used by a man named McC*oy*; that house was where the defendant's house now is, or right close there somewhere.

Cross-examination:

I know nothing as to who lived there prior to the time I started the dairy there in 1891. The dairy was put there in the fall of 1891, and it remained there until 1897. I had occasion to be over the ground during the summer of 1898, but I was not there for two or three years after 1898. The smelter was there in 1898. Most of the smelter was open but shedded over. The smelter was not in operation in 1897 and 1898. The house in which the Cordova- lived was but a short distance from the smelter; the best I recollect the house was covered with brush when I first knew the property. To
73 the best of my recollection, the house was 75 or 100 yards northeast of the smelter. I mean the Cordova house was northeast of the smelter. When I was there in 1898 after the flood I did not see any house there at all.

MILLARD PATTERSON, testified for the plaintiff, as follows:

I live in El Paso, Texas, and am a lawyer. I have lived in El Paso 33½ years. I came here about the 1st of March, 1883. I knew Major Noyes Rand. I met him very soon after I came here probably in the month of March, 1883, when I visited him at his home. I can show you where he lived by using the map. I was very familiar with the proposition for at least 26 years. This map has been added to since the original survey. The line runs straight north and south to the river. Here is the west line of the Bassett Addition which runs straight to the river. Here is the Texas & Pacific Reservation, and Major Noyes Rand had his home just north of this reservation. I cannot show on the map just where it was, but it was north of the reservation. I would say it was in here about under the old "A" in the name "Addition" and pretty near the center of the addition. I visited him at his home where he lived up to the time he gave up the property in 1898. I know that he lived there continuously during the time. I met him in the spring of 1883, and he lived there at the same place until 1898. This is known as the George Wimberley Map made in July, 1899 and is the official map of El Paso. I first became very familiar with the lines of the Cotton Addition in 1893, and I knew the addition in a general way prior to that time. I knew where Major Rand lived and

where the smelter was. I know where the smelter was built in 1886 or 1887. I have indicated on this map by the name "smelter" where the old smelter was located; it was a little smelter that was built there in 1886 or 1887 and it remained there up until the time it burned down in 1901. I know the place where the de-
74 fendant lives at the present time. That is east from the smelter in the direction of the canal as shown on the map, and I put it in a general way about southeast of Section T in the old Cotton Addition and I mark it with "CC." I would not say it was exactly there, but I know it is north of the canal and it is east of the Texas & Pacific Railroad which extends down and runs into Tenth Street. I have been acquainted with that particular tract of land a long time, the tract known as the Cordova place for identification. I became very familiar with the land in there in the fall of 1898 and from that time on. In fact I was real familiar with that part of the addition from 1883 on. I am familiar with the suit in forcible entry and detainer instituted to remove Pablo Cordova from the land. At that time, in 1889, 1890, 1891 and 1892, I had no connection with the business of Cotton, and I was entirely free to represent Pablo Cordova in any way. I represented him in this forcible entry and detainer case mentioned here. I did the best I could for him and he was ejected by the suit mentioned. I will show from the map how the land was located with respect to this land. The judgment was against Cordova for Blocks 206, 207, 208, 209, 210, 211 and 212 as designated on the Cotton Addition to the City of El Paso, and the description is shown in the judgment which has been introduced in evidence. By that map the present house occupied by Mrs. Cordova now would be here, just east of the smelter, and somewhere about Block 207 as shown on the map. The canal is shown along 8th Street and turning northeasterly. This block is 205 to correspond to your block 61 according to your map of Cotton Addition. As I said before, the house was east of the smelter. This map was never filed as a public record. I have known the history of the Cotton Addition since 1889. I know there was never a lot or block sold by that map; I know that no property was ever sold south of the Texas & Pacific reservation by that map about 1889 or 1890. In 1894, J. L. Campbell made an official map of the City of El Paso, and that map was adopted by the City in 1895. In that map all the lots and blocks south of the Texas
75 & Pacific reservation are left blank. There are no lots and blocks on the map there. Since 1893 I have had professional connection with the Cotton Addition. Some time after that it passed into my control, and I represented the owners in El Paso and had control of the Cotton Addition for a considerable period. As before stated, Major Noyes Rand was in possession of the addition in 1883 when I came here, and he remained in possession of the addition up the fall of 1898. In the fall of 1898, I think in November, I brought suit against Major Rand, and my interest in the property at first was to represent certain parties who claimed an equitable interest under Frank Cotton. Judge Merchant represented Frank Cotton and all persons interested in the property as against Major

Rand. In the fall of 1898, I took possession of the property under a writ of sequestration. I brought an action in the District Court and a writ of sequestration was issued, and I had the Sheriff take the property from Major Rand, and after ten days I gave a replevin bond and the property was turned over to me, and I took actual possession of it in the fall of 1898, probably in November, I don't remember the exact dates without looking at the bond I gave. I know I took possession from Major Rand and the Sheriff put him out. Very soon after I took possession in the fall of 1898, I went over the whole addition from one end to the other with R. C. Loomis who is now dead. I then represented Mr. Cotton and everyone else interested in the addition and my purpose was to ascertain the names and the facts of the possession of every person on the addition from one end to the other, and I went over it with that object in view. I saw every person on that addition, except two people who lived in adobe houses over the other side of the canal, and I relied on Mr. Loomis' statement about those people. He said it was useless to see them because they were tenants and paying rent. At that time there was no house where the Cordovas now live, and Pablo Cordova was not on the addition at that time nor was his wife or any of the Cordovas. I owned the little smelter at that time. I own the smelter property now and at that
76 time owned a large interest in it. I afterwards became the owner of it. In the fall of 1898, I went in possession of the premises, and I remained in possession of it up to the time I turned it over to Judge Grant and Coles Brothers, and I believe that was about the first of 1906. I took these precautions to protect myself against trespassers. In the first place I went over the addition with Mr. Loomis, and I was on the addition down about the smelter very often. I operated the smelter the latter part of the year 1897 and I think a part of 1898, and I had the smelter there until the month of February, 1901. Afterwards, I think in 1901, I made a contract with George Briggs who was a customs inspector by which I allowed him to occupy a house on what is called Myrtle Avenue. It is called the County Road now. I think I charged him a nominal rent in consideration of which he was to watch the property and see that nobody got on it. I know there was nobody on the property from the fall of 1898 up to the time I gave the contract to George Briggs. From the time I went on the premises and examined the property for myself and up to the time I made the contracts no one had moved on to what is now called the Cordova place and living there at all. There was no occupancy of it of any kind. The big flood came in 1897, and there was a pretty good sized river around the smelter. The smelter stood on an island and after the water subsided the ground around there was level. The bushes had been torn out and washed away, and after the flood it grew up in a thicket. I would not call what happened in 1898 another flood; there may have been backwater but there was no flood. I do not remember about the water backing up there. The floor of 1897 was one of the largest we have ever had here.

Plaintiff for the purpose of fixing the date, offers in evidence a contract or lease between the witness and George Briggs, referred to in the testimony of this witness, the paper being dated March 1, 1901.

77 The property in the Cotton Addition has always been assessed for taxes and taxed as acreage property and not by lots and blocks. The Cotton Addition was not in the City of El Paso until 1889, and after that it was always assessed by the City County and State as acreage property without regard to lots or blocks. I did not pay the taxes on it, but I know they were paid. They were not paid promptly for a while, but I know they were finally paid. The City assessed the property for 1889 and after that time. I forgot to state that after I got possession of the property that I made a lease to Mr. J. A. Smith. I leased a part of the Cotton Addition, covering the part claimed by Mrs. Cordova to him. He was running the El Paso dairy. He took possession of the property under me in the early part of 1889 and held it up to the time I turned it over to Judge Grant and Mr. Cole and his brother. I made Smith the lease he mentioned this morning. In describing the property I described it in the manner shown on an old abandoned map of the Cotton Addition, and substantially the map by which they sold Blocks in 1882, 1883 and 1884 when the addition was first platted. It was before it came into the City of El Paso that the map was made. I saw yesterday somewhere a small map that showed substantially the blocks as they were then. Here is A Street. The railroad runs down A Street. This is the west line of the Cotton Addition, and here is Cotton Avenue, and it comes up here approximately to the northeast corner of Block 180 on this larger map to which I have referred heretofore, the map by Goodrich. The lines then runs down with the east line approximately with the line of the railroad to the canal. It then runs along the canal up to a point practically east of the northeast corner of Block 180, and then back to the place of beginning, taking in a piece of land bounded on the west by the Texas & Pacific Railway, and on the north by a line projected from the south line of First Street, and thence with the canal back around to the Texas & Pacific Railroad. This map was never filed. After the incorporation of the Cotton Addition into the City of El Paso in 1889, by the charter of 1889,

78 there was no map filed showing the subdivision of that below the Texas & Pacific Railroad reservation into lots, blocks and streets, but it was left as a large piece of property, what you would call acreage property, south of the Texas & Pacific reservation. During the time I was in control of the Cotton Addition for myself and others there was no segregation into lots, blocks and streets south of the Texas & Pacific Railroad reservation, and the City has never laid out and opened any streets down there.

Cross-examination:

The lease which you show me and which has been read in evidence was signed by me as administrator of Coit, and it was written

by me. When I wrote that lease I know that lots, or rather blocks, had been sold according to the map to which I referred in 1882, 1883 and 1884. The property on which the defendant now lives was embraced in the lease to Smith. What you show me is not a substantial copy of the map referred to in the lease. The blocks, streets and everything are changed. The whole thing, even to the position of the streets is changed. What you show me is a copy of the map made by Goodrick in 1889 I think. The suit to which I referred was brought by Judge Merchant and he was the attorney representing the Cotton estate. He described the lots and blocks by this map. That suit was brought in 1889. Prior to that time in 1892 there had been made a map which cut into lots and streets the property where the defendant now lives, and it covered the whole addition from the north end to the river. Lots and blocks were sold by that map in 1883, 1882 and 1884. I don't know how many were sold, but I know some were. All I can remember that were sold were north of the Texas & Pacific reservation, and there may have been some sold south of it. I was in possession of the property from 1898 to about 1906, fully seven years. I know the property was in arrears for taxes for years. I remember I was connected with a tax suit that involved taxes on this property. I presume the
79 suit was brought by the parties to whom the taxes were due, the State, County and City. I know the taxes were finally paid, but they were not paid when due. I know the taxes were delinquent for some time after 1893, and I believe there were some taxes delinquent prior to 1889. I do not know that there was litigation in an effort to reli-ve the property from the embar-assment of the taxes in, 1906 and 1907, in which Mayor Kelly of the City was receiver. I know the property was in arreas for a number of years before the taxes were paid. I represented in the litigation I have mentioned Samuel Coit, Z. T. White and myself and others. I represented every equitable owner in the addition except Mr. Cotton, and Judge Merchant represented him. I represented him with Judge Merchant. The suit was brought against Major Rand. Mr. Coit had an equitable interest and I brought the suit as administrator and took possession of the property, and held it for those interested in it. There was no map at that time that represented the area where the defendant lives outside of the map made in 1882. There has never been any map since this map that divided the property into blocks. The City official map of 1894 absolutely ignores the map of 1882. The City Map of 1894 covers the whole Cotton Addition. There is no map dividing that section into lots and blocks except the map of 1882. The map of 1894 ignores the lots and blocks.

Redirect examination:

I owned that smelter from the latter part of 1897 until it burned down in 1901, and I was close to the property very often. I gave the smelter my personal attention. I know that up to 1901 that there was no one on the property involved in this suit.

The plaintiff next read in evidence copies of letters from the office of the Secretary of State of the United States, duly certified and proved to be correct copies of the originals thereof, as follows:

80 Copy.

Address official communications to the Department of State, Washington, D. C.

Department of State,

Washington, July 8, 1916.

William C. Dennis, Esquire, 810 Union Trust Building, Washington, D. C.

SIR: The Department has received your letter of June 28, in further relation to the ejectment of squatters from the Chamizal tract and to the Department's attitude toward the Chamizal award of 1911. You request a certified copy of the Department's letter to you of July 10, 1913, which is enclosed herewith, and for which you are requested to forward your check for seventy-five cents to the Disbursing Clerk of the Department. You inquire whether you are correct in assuming that the Department's attitude toward the Chamizal award remains unchanged and as set forth in the Department's aide memoire of August 24th, 1911, handed to the Mexican Embassy, which is quoted in part in the Department's said letter to you.

In reply I have to say that the attitude of the Department of State, with respect to the award made by the International Boundary Commission, United States and Mexico, in the Chamizal case in 1911, is unchanged, and is as stated in the aide memoire handed by the Department to the Mexican Embassy, August 24th, 1911, from which quotation was made in the Department's letter to you of July 10, 1913. In this memorandum the Department said:

"For the reasons set forth by the American Commissioner in his dissenting opinion, and by the American Agent in his suggestion of protest, the United States does not accept this award as valid or binding.

81 "But even on the assumption that the award rendered by the Presideing Comm-ssioner is valid and binding, it has confessedly failed to accomplish the object which the High Contracting Parties had in view, namely, 'to terminate * * * the differences which have arisen, * * * as to the international title to the Chamizal tract,' inasmuch as it makes no attempt to locate the boundary line at the tract in dispute, and its effect is to remit once more this all-important matter to the two parties for settlement."

In this connection as further showing the attitude of this Government with respect to the Chamizal award and the subsequent negotiations looking toward a diplomatic settlement of the questions involved, you are referred to President Taft's annual message to Congress of December 7, 1911, in which he used the following language:

"Out arbitration of the Chamizal Boundary question with Mexico was unfortunately abortive, but with the earnest efforts on the part of both governments which its importance demands, it is felt that an early practical adjustment should prove possible."

And to his annual message of December 4, 1912, in which he said:

"In the interest of the people and City of El Paso this Government has been assiduous in its efforts to bring to an early settlement the long standing Chamizal dispute with Mexico. Much has been accomplished and while the final solution of the dispute is not immediate, the favorable attitude lately assumed by the Mexican Government encourages the hope that this troublesome question will be satisfactorily and definitely settled at an early day."

I am, sir,

Your obedient servant,

For the Acting Secretary of State, ALVEY A. ADEE,
Second Assistant Secretary.

Enclosure: To Mr. Dennis, July 10, 1913.
711.1215.

82 Copy.

No. 208.

March 22nd, 1910.

EXCELLENCY: I am happy to realize from your recent conversation at the Department, that the Government of Mexico, equally with that of the United States, is, at the present moment, more than ever before, anxious to bring to a definitive and prompt settlement the question of the sovereignty of the Chamizal tract, which has been the subject of negotiations between the two Governments ever since the failure of the Joint Commission in 1897 to settle the boundary at this point. Negotiations which have been particularly active during the last three years.

On July 19th, 1907, your Excellency's distinguished predecessor proposed arbitration, and in line with his suggestion there was considered and discussed the reference of the question to arbitration by a Canadian jurist. The Government of the United Mexican States very naturally concluded from the delay of the Federal Government's categorical response, that the proposal in question had failed to commend itself. Therefore, as further evincing the desire for early settlement, Your Excellency recently so ably carried out your instructions to seek settlement of the question by an exchange of territory to be effected on the ground of interpretation of the line, thus making more specific the general suggestions made by your predecessor on May 21st, 1908, and December 12th, 1908.

In the earlier of these communications and evidently with a view to facilitating this method of settlement, your Excellency's predecessor proposed a new Boundary Treaty, which should have also the effect of working some modifications,—not, however, deemed by this

Department, after the most careful consideration, to be material,—in the rules which guide the Joint Commission in tracing the Boundary under the present convention.

So long ago as March 21st, 1907, your predecessor called the Department's attention to the action of the United States Marshal in proceeding to the execution of certain writs of sequestration
83 which had been issued by the United States District Court against certain persons, in possession of land within the disputed tract which they claimed under Mexican title, and at the request of your Excellency's Government, this Government intervened in these proceedings, calling the attention of the Federal Courts to the Treaty provisions whereby jurisdiction as regards the international title to the Chamizal tract had been conferred upon the International Boundary Commission, and suggested to the Federal Court, through the Department of Justice that, as a matter of international comity, no proceedings between individuals as regards private title which might seem, even indirectly, to involve the question of national sovereignty, should be allowed to proceed to the point of actually putting into execution writs of sequestration or of ejectment against the persons alleging Mexican title. Since that time your Excellency's Government has, on various occasions, called the attention of this Department to proceedings in the American Courts, deemed by Your Excellency's Government to threaten the disturbance of the possession of persons claiming under Mexican title in the disputed tract and this Department has from time to time, in response to these requests, investigated the various matters complained of, and taken such action as seemed appropriate in the premises.

It is not necessary to point out that in thus acting, as a matter of comity, in accord with the theory that the international sover--ignty was in dispute, this Government has never admitted any derogation of its de facto jurisdiction over the Chamizal tract, any more than it has ever expected Mexico to do so, in the case of that portion of Cordova, the status of which is theoretically similar. I would further invite your Excellency's especial attention to the fact that although, in practice, certain other persons have inadvertently profited by the stay of action by American courts, yet this Government has, in no instance, consented or intended to do more than stay judicial proceedings and the results thereof, in the cases of
84 persons actually claiming under Mexican titles.

Unfortunately, this liberal policy has had a result which the Mexican Government would surely be the first to deplore; that is, many individuals without even prima facie evidence of title or right are taking actual physical possession of lands in the Chamizal tract, relying upon the benevolence of this Government to shield themselves from the just consequences of their wrongful acts,—a result evidently never contemplated by your Government.

The extreme irritation of the people of El Paso at this situation will at once be apparent to your Excellency, and you will share my anxiety when I assure you that this situation is fraught with danger of actual violence that I feel it must be at once remedied in order to

prevent some untoward incident which would disturb the good feeling which now so happily prevails between the people of El Paso and Juarez; and I add that the tension I find to exist on the ground is a great factor in compelling me now to ask the early and earnest consideration of your Excellency's Government to the proposition which I shall now make, both to safeguard the immediate future and to assure a settlement of the question within the next half year,—a result in the attainment of which I may rely upon your Excellency's energetic and able co-operation;

First. The Government of the United States, as a practical compromise, proposes to continue until the settlement of the question of the sovereignty of the Chamizal, the stay of proceedings in cases of persons able to show that they are claiming under prima facie Mexican title and that they or their predecessors in interest were in actual occupation of the land so claimed on March 15, 1910, but not to interfere with the proper exception of judicial process against persons upon the Chamizal tract who have no prima facie Mexican title, or who have come upon the land in person or through those in privity with them since the 15th of March, 1910. The Department proposes to appoint an officer who shall be authorized to pass upon
the question of the existance of prima facie Mexican title,
85 and of the fact of actual possession under such title, prior to
March 15, 1910, and to report to the Department the cases wherein ejectment should be prevented by virtue of international comity, whereupon the necessary action will be taken by the appropriate officers of the Department of Justice, as has been done in the past. It is not doubted that the Mexican Government will at once perceive that this arrangement is fully responsive to the true intent of its original request, that it is necessary to enable the United States to continue to exercise the de facto jurisdiction which it has heretofore exercised over the tract in question since its formation; and that it is entirely consistent with the contention of the Mexican Government as to the theoretical status of the land pending the final settlement of the question of sovereignty. In conclusion this Government cannot too strongly urge the acceptance of these temporary arrangements as a practical temporary solution of a situation which has become impossible.

Second. The Government of the United States greatly regrets that while impressed with the convenience of a settlement of the boundary by exchange of territory upon the theory of interpretation of the boundary line, it finds it quite impracticable to agree upon the basis of exchange involving relinquishment by the United States of San Elizario as well as Horcon and the portion of American territory now on the Mexican side of the present channel near El Paso.

Third. As indicated above, the Government of the United States, is still unable to persuade itself that a new treaty in the sense suggested by the communication of the Mexican Embassy would be of a mutual benefit sufficient to justify its negotiation.

Fourth. Adverting to the general suggestion of arbitration, the Government of the United States proposes that the Governments of the United States and Mexico proceed forthwith to submit, each to

the other, a list of three Canadian jurists, say one of whom would be a satisfactory umpire, and thereupon the two Governments seek to agree informally upon one name from these lists, and that, in
86 the event of failure to do so, the Government of the Dominion of Canada be asked to make a selection from the six jurists named. It is proposed that thereupon the two Governments resubmit the question of the sovereignty of the Chamizal tract to determination by the present Joint Commission, acting with the Canadian Jurist so selected as the Third member with a casting vote. It is further proposed that a convention in this sense be so framed that the decision of the Joint Commission, enlarged as above, shall be arrived at in four months.

Doing myself the honor to lay these proposals before Your Excellency, I cannot too earnestly request for them the earliest and most considerate attention and I take advantage of this opportunity to renew to your Excellency the assurance of my highest consideration.

P. C. KNOX.

17039.

His Excellency Senor Don Francisco Leon de la Barra, Mexican Ambassador.

87 Copy.

Translation.

No. 366.

Embassy of Mexico to the United States of America.

Washington, June 9, 1910.

MOST EXCELLENT SIR: In accordance with the instructions I received today, I have the honor t- inform your Excellency that my Government accepts in general the propositions contained in your Department note No. 208, of March 22nd, last, relative to the maintenance of the status quo in El Chamizal and to the solution by means of arbitration of the question of sovereignty over the said tract.

My Government, which as early as 1907, proposed to that of the United States recourse to arbitration, as may be seen from this Embassy's note of June 19th of that year, is gratified at having this legal mode resorted to for the solution of so delicate a question.

The Department of Foreign Relations of my country takes notice that the American Government, while calling the exchange of territory proposed by Mexico under the interpretation of existing treaties convenient, does not bring itself to accepting the exchange or deeming it necessary to conclude a new Boundary Treaty.

The Government of Mexico regards as non-subsisting the propositions made by both countries prior to your Excellency's note of March 22nd last, and declares, through this Embassy, that it accepts

arbitration in the form described in the said note, as well as the terms suggested for the maintenance of the status quo in El Chamizal; provided that the decisions of the Commission to be designated by the Department of State shall have but a provisional character and shall not impair the rights that the interested parties may have on the land.

My Government further desires that the said Commissioner seasonably communicate a copy of his decisions to the Mexican Delegate on the International Boundary Commission.

88 Cordially rejoicing in this further step toward the fir-ndly solution of this troublesome question in accordance with the principles of justice, I take pleasure in renewing to Your Excellency the assurance of my highest and most distinguished consideration.

F. L. DE LA BARRA.

89 Copy.

June 27, 1910.

Mr. Wilbur Keblinger, American Commissioner on the Commission for the Study of the Equitable Distribution of the Waters of the Rio Grande and Colorado Rivers, The Balfour, Washington, D. C.

SIR: The Department encloses herewith a copy of its note No. 208, of March 22nd, 1910, to the Ambassador of Mexico at this capital, reviewing the circumstances in connection with the dispute between the United States and Mexico over the sovereignty of the Chamizal tract and proposing that the question be submitted to arbitration. Your attention is particularly called to that passage in the note in which the Department says: "The Department proposes to appoint an officer who shall be authorized to pass upon the question of the existance of prima facie Mexican title and of the fact of actual possession under such title on March 15, 1910, and to report to the Department the cases wherein ejectment should be prevented by virtue of international comity, whereupon the necessary action will be taken by the appr-priate officers of the Department of Justice as has been done in the past."

The Department takes pleasure in designating you as the officer in question, and you are accordingly authorized, in case you are so requested either by the Mexican Commissioner of the International Bounda-y Commission or by any person or persons in the Chamizal tract against whom legal proceedings looking toward ejectment are threatened or undertaken, to pass upon the questions as to whether or not such persons are claiming under prima facie Mexican title, and whether or not "they or their predecessors in interest were in actual occupation of the lands so claimed on March 15, 1910." In case you find, first, that any claimant claims under prima facie Mexican title, and second, that such person or his predecessors in interest were in actual possession of the land so claimed on March

90 15th, 1910, you will report your findings in full to the Department, together with such an abstract of the evidence in the case as you may deem necessary to the end that the Department

may request the appropriate action through the Department of Justice. In case immediate ejectment proceedings are threatened so that there is no time for reference of the matter to the Department, you will act upon your own responsibility, and if you deem that the nature of the case so requires you will request the United States District Attorney or his local assistant to take such action as may be deemed appropriate. In cases of importance or doubt where there is no time for a written report to the Department you will consult the Department by telegraph when practicable.

The Department feels that your familiarity with the matters in controversy and with the local conditions at El Paso should enable you to exercise proper discretion in the handling of the various cases which may arise, and that you will always bear in mind the desirability of maintaining amicable relations between the citizens of the United States and Mexico pending the final arbitration of the Chamizal controversy under the proposed convention between the United States and Mexico.

I am Sir,

Your obedient servant,

P. C. KNOX.

Enclosure: As stated above.

17039.

91 Copy.

January 15, 1912.

Wilbur Keblinger, Esquire, Officer of the United States in charge of the Maintenance of the status quo in the Chamizal Tract, 2 Dupont Circle, Washington, D. C.

SIR: The Department has received your report of the 2nd instant, transmitting correspondence in regard to the status of certain lands in the Chamizal Tract, and in this connection begs to refer also to your reports of October 12th and 25th and December 8th, 1911.

Inasmuch as your reports show the existence of no prima facie Mexican titles to lands in the Chamizal tract, and no actual possession thereof under such title, prior to March 15th, 1910, the Department understands that under the status quo agreement between the United States and Mexico, it is not called upon to prevent ejectment proceedings against the persons named in the list submitted by Messrs. Beall, Kemp and Ward, attorneys, in their letter to you of July 15th, 1911 (excluding from consideration for the present, the nine persons represented by Mr. Thurmond and referred to in your letter to Mr. Thurmond of October 25th, 1911, as to whom further proof is awaited). You are, therefore, authorized so to inform Mr. Walter B. Grant and Attorney of the Cotton Estate in the Chamizal Tract, unless for any reason you think a different course should be adopted, in which case you are requested to submit to the Department any suggestions which you may wish to make thereon.

You are requested to send a copy of your report of the 2nd instant and of your letter to Walter B. Grant, above authorized, to the Mexican member of the United States and Mexican Boundary Commission, in accordance with the status quo agreement.

I am, Sir,

Your obedient servant,

P. C. KNOX.

711.1215/-398.

92 Copy.

International Boundary Commission.

United States and Mexico.

American Section.

Washington, D. C.,

March 4th, 1912.

The Honorable the Secretary of State.

SIR: Referring to the Department's letter of January 15th, 1912, authorizing me, if I deemed it proper, to inform Mr. Walter B. Grant, Executor of the Cotton Addition lands in the Chamizal tract, that all of the 118 persons occupying land in that Addition, with the exception of nine still under consideration, had failed to meet the requirements of the status quo agreement, between the United States and Mexico. and therefore, were not entitled to the protection afforded by the agreement, I have the honor to enclose herewith a copy of a letter of January 18, 1912, authorizing Mr. Grant to proceed against these people in the usual manner. You will observe that I have advised them to use the greatest care not to disturb any other occupants than those mentioned in my letter.

A copy of this letter was also furnished the Mexican Boundary Commissioner on January 18th, 1912, as directed by the Department.

I have the honor to be, Sir, very respectfully,

Your obedient servant,

WILBUR KLEBINGER.

93 Copy.

Washington, D. C.,

January 18, 1912.

Mr. Walter B. Grant, Executor of the Cotton Estate in Chamizal Tract, Boston, Mass.

DEAR SIR: On July 15th, 1910, your attorneys in El Paso, Texas, Messers. Beall, Kemp and Ward, addressed me a communication presenting a list of 128 persons occupying land in the Chamizal tract, claimed under American title by the Cotton Estate, and requesting

to be advised of the names of those, on the list, not able to meet the requirements of the agreement between the United States and Mexico for the maintenance of the status quo in the Chamizal tract as to title and possession, in order that they might institute proceedings for their eviction.

Of the 128 names presented by Messers. Beall, Kemp and Ward, the following (20) were withdrawn shortly after their presentation:

Caballero, Priscíliano
Calderon, Wenceslao
Duran, Juan
El Paso Dairy Co.
Flores, Jesus
Filoteo, Nicanor
France, Trinidad,
Gomez, Antonio
Hernandez, Manuel
Lopez, Tiburcio
Madrid, Sabiniano
Mendivil, Maximo
Morales, Amado
Nevarez, Guadalupe
Palma, Elgio
Perea, Ramon
Quintana, Jesus
Rocha, Margarito
Sorenson & Morgan
Samaniego, Dr. J. A.

In the cases of the following ninety-nine persons it has been found that under the status quo agreement the United States is not called upon to interfere to prevent ejectment proceedings:

94 Andrade, y Morales, S.
Armendariz, Cipriano
Avila, Refugio
Garcia, Faustino
Guerra, Benito
Luna, Porofirio
Medina, Martin
Rodriguez, Francisco
Rodriguez, Eleno
Tarin, Luz
Torres, Gabriel
Valencia, Jesus
Adams, Juan
Anaya, Ricardo
Armenta, Idlefonso
Benevides, Mrs. Cruz (Maria C.)
Gutierrez, Francisco.
Lechuga, Mrs. Jesus
Lechuga, Ursulo
Ronquyllo, Martin
Valenzuela, Macario
Vasquez, Refugio
Candelaria, Cesario
Cue, Gaspar
Gonzales, Sestenes
Griego, Candelario
Perez, Urbano
Cano, Ramiro
Cano, Ravindo
Casas, Arnulfo
de la Vega, Francisca
Bustillos, Juan
Garillo, Maximo
Gomez, Anastacio
Guevara, Juan
Guevara, Narcisco
Jordan, Luis
Juarez, Telesforo
Lachuva, Inez
Maldonado, Concepcion Vda de
Martinez, Adolfo
Martinez, Francisco
Martinez, Valente,
Marquez, Elano
Medina, Pablo
Malenerez, Aniceto
Membriia, Ramon
Membrila, Wenceslao
Morales, Domingo
Meza, Manuel,
Morales, Jesus
Ronquillo, Amada
Rueda, Jesus
Delgado, George

Madrid, Abram
Garcia, Jesus
Engelking, S.
Geo. Paul
Adame, Alejandro
Adame, Catarino
Alvarado, Ignacio
Ascevedo, Melecio
Bejarano, Andres
Canas, Jose Maria
Carbajal, Ramon
Carpio, Jorge
Castanada, Jose
Cortes, Victoriano
Delgado, Busebio
Dominguez, Martin
Flores, Lucas
Flores, Lucas
Flores, Martin
Garcia, Trinidad
Garcia, Nestor
Garcia, Francisco
Garcia, Jose
Giron, Maximo
Gomez Lorenzo
Gonzales, Francisco
Granado, Guadelupe
Guerra, Felipe
Guetierrez, Tomas
Hernandez, Felix
Hinjose, Jose Maria
Holguin, Isidro
Inglesias, Venancio
Morquecho, Agustin
Ochoa, Juan
Olivas, Jesus J.
Perea, Luis
Powers, Pete
Romero, Prudencia
Ruiz, Santos
Sotalo, Silvano
Soto, Ramon
Villanueva, Dolores
Zanbrano, Jesus Maria
Lea, Tom, Jr.
Avila, Mariano

In the case of the following parties, represented by Mr. Seymour Thurmond, an attorney of El Paso, Texas, — are still under consideration, and their present status is to be maintained for the time being. As soon as the decision is arrived at in these cases, you will be duly notified:

Martinez, Jose
Paul, Geo. H.
Gutierrez, Pedro
Alvarado, Santiago
Gutierrez, Francisca
Cordova, Candelaria Vda. de
Garcia, Octaviano
Valdez, Dolores
Gonzales, Jose

95 If you should see fit to cause the eviction of the ninety-nine persons above mentioned, I must earnestly recommend that the greatest care be taken to prevent the disturbance of every one except those named in the list of ninety-nine, and in particular to see that the nine persons represented by Mr. Thurmond, and whose cases are still undecided, are unmolested.

It should be noted that Geo. Paul, who Mr. Thurmond states, is not in possession of any land in the Chamizal tract, is not to be confused with Geo. H. Paul, who is included in the nine persons whose cases are yet undetermined.

Yours very truly,

WILBUR KEBLINGER.

96 Copy.

March 14, 1912.

Wilbur Keblinger, Esquire, Officer of the United States in Charge of the Maintenance of the Status Quo in the Chamizal Tract, 2 Dupont Circle, Washington.

SIR: I beg to acknowledge receipt of your letter of the 11th inst., transmitting correspondence and documents relating to the claim of certain occupants of lands in the Cotton Addition of the Chamizal tract, and in this connection ask leave to refer also to your previous reports on this subject.

In reply you are informed that, inasmuch as you report the existence of no prima facie Mexican title to land in the Cotton Estate, in the Chamizal tract, in the nine persons mentioned in your report of March 11, 1912, being also the nine persons represented by Mr. Seymour Thurmond and referred to in your letter to Mr. Thurmond, of October 25th, 1911, this Department understands that under the status quo agreement between the United States and Mexico, it is not called upon to prevent ejectment proceedings against these nine persons.

You are therefore authorized to so inform Mr. Walter B. Grant, as Executor and Attorney of the Cotton Estate in the Chamizal tract, unless for any reasons you conclude that a different course should be adopted in which case you are requested to submit to the Department any suggestions which you may wish to make thereon.

You are requested also to send a copy of your report of March 11th, 1912, and of your letter to Walter B. Grant, above authorized, to the Mexican members of the United States and Mexican Boundary Commission, in accordance with the status quo agreement.

I am, Sir,

Your obedient servant,

HUNTINGTON WILSON,
Acting Secretary of State.

711.1215.

97 Copy.

International Boundary Commission.

United States and Mexico.

American Section.

Washington, D. C.,

March 15, 1912.

The Honorable the Secretary of State.

SIR: Referring to the Department's letter of the 14th instant acknowledging receipt of my report on the 11th instant on the claims

of nine persons represented by Mr. Seymour Thurmond of El Paso, Texas, I have the honor to enclose copy of my letter of the 15th instant to Mr. Walter B. Grant, Executor of the Cotton Estate in the Chamizal tract, in which he is informed that the nine persons mentioned therein have failed to present a satisfactory Mexican chain of title to the land occupied by them and that under the agreement between the United States and Mexico for the maintenance of the status quo in the Chamizal tract the United States is not called upon to prevent ejectment proceedings in these cases.

I have also sent a copy of my report of the 11th instant and of my letter to Mr. Grant of the 15th instant to the Mexican Member of the International Boundary Commission, as called for by the agreement.

I have the honor to be, Sir, very respectfully,

Your obedient servant,

WILBUR KEBLINGER.

98 Copy.

Washington, D. C.,

March 15, 1912.

Mr. Walter B. Grant, Executor of Cotton Addition Estate in Chamizal Tract, care Mr. William C. Dennis, Union Trust Building, Washington, D. C.

SIR: Referring to my letter of January 18, 1912, advising you that the United States would not interfere to prevent the ejectment proceedings in the cases of ninety-nine persons whose names had previously been presented to me by your attorneys in El Paso, Texas. Messers. Beall, Kemp and Ward, on July 15th, 1910, I now have to advise that I have investigated the claims of the nine persons who were still under consideration when I wrote you on January 18th, and to state that these parties have failed to furnish such a Mexican title as required by the agreement between the United States and Mexico for the maintenance of the status quo in the Chamizal tract, and, therefore, the United States is not called upon to interfere to prevent ejectment proceedings in their cases. Their names are as follows: Jose Martinez; Geo. H. Paul; Pedro Gutierrez; Santiago Alvarado; Francisca Gutierrez; Candelaria Vda. de Cordova; Octaviano Garcia; Delores Valdez and Jose Gonzales.

Yours very truly,

WILBUR KEBLINGER.

99 Whereupon plaintiff again rested his case, and the defendant in rebuttal offered the following evidence:

Defendant introduced in evidence a deed from Frank B. Cotton and his associates, to Siras H. Cline, dated July 16, 1881, duly acknowledged, and filed for record April 20, 1882, and recorded in Book 3 at p. 75, and containing the following description: A certain lot or parcel of land situated in the Cotton Addition to the City

of El Paso. Beginning at a point where the East Boundary line of a 70 foot street known as Cotton Avenue intersects the North line of the Texas & Pacific Railroad depot grounds; thence north with said East line of Cotton Avenue, 74 feet more or less to the Southwest corner of Lot No. 2, Block 29, as shown by the map of said Cotton Addition; thence East 120 feet to alley 20 feet wide; thence South 70 feet more or less to the northerly line of the Texas & Pacific Railroad Company reservation. Thence with said line to the place of beginning.

Defendant introduced in evidence a certain deed from the same grantors as above to the same grantee, dated February 7, 1883, filed for record May 22, 1884, and recorded in Book 5 p. 401 of the Records of Deeds of El Paso County, and conveying certain land adjoining the tract above described.

Defendant introduced in evidence a certain deed from the same grantors as above to Elizabeth Allen Cotton, dated September 16, 1883, filed for record September 13, 1884, and duly recorded, conveying land near the tract above described.

Defendant introduced in evidence a deed from the same grantors above named to Horace J. McKilligan, dated January 2, 1883, and duly acknowledged and recorded, and conveying land near that above described, and referring to the same map.

100 Whereupon, defendant rested her case and moved the court to instruct the jury to return a verdict for the defendant for all the reasons embraced in her earlier motion, and for the further reason that it appeared from the evidence of plaintiff and that offered by defendant that the land described in plaintiff's petition was made an addition to the City of El Paso and streets and alleys were dedicated therein during 1881, 1882, 1883 and 1884, which dedication remained ef-ective, wherefore, plaintiff had no title, or, at all events, no right of possession of the said streets and alleys, and he did not so describe any lots or blocks as to entitle him to recover any of said lots or blocks, which motion the court denied, and the defendant then and there in open court excepted to said ruling, and hereby tenders this her bill of exception, which is accordingly allowed and signed.

Whereupon the plaintiff introduced WALTER B. GRANT, who testified for *defendant* as follows:

I live at Boston, Mass., and am sole surviving independent executor of the Cotton estate. I have heard the description of the two tracts of land on Cotton Avenue, and both lots are very near two blocks north of the Texas and Pacific Railway reservation.

Fourth Exception.

After the closing of the evidence and the denying of defendant's motion for an instructed verdict in her favor, the defendant specially requested the court to charge the jury as follows:

"Counsel for defendant request the court to instruct the jury as

follows, if the court shall overrule the defendant's motions for peremptory instruction, and without waiving exception to such ruling, and without waiving exceptions to the court's charge or to instructions given at the request of plaintiff, or to the ruling sus-
101 taining the demurrer to defendant's plea to the jurisdiction, to wit: If the jury shall find from the evidence that Pablo Cordova had a regular chain of deeds from and under the Government of Mexico down to him, the jury will not proceed further, but return a verdict so stating."

Which instruction was by the court refused and defendant excepted to the refusal of said instruction and hereby tenders her bill of exceptions, and which is allowed and signed.

Fifth Exception.

And the court after having refused the motion of defendant for an instructed verdict, and after having refused the alternate special instruction requested, as shown in Exception No. 4, proceeded to instruct the jury, among other instructions, that the plaintiff was entitled under the evidence to recover the land sued for, unless the jury should find for defendant on her plea of the statute of limitation, to which instruction to the effect that plaintiff's title was sufficient to support a recovery, if not defeated by the defense of limitation, the defendant excepted, and hereby tenders her bill of exceptions which is allowed and signed.

The foregoing bill of exceptions having been submitted to counsel for plaintiff in the foregoing numbered and styled cause and duly considered by them, it is agreed that the same is correct and may be approved by Judge Gordon Russell, who presided at the trial, within the time allowed by order of court at the October Term, 1916, of said court.

BEALL, KEMP & NAGEL,
TURNER & BURGES,
Attorneys for Plaintiff.

102 The foregoing bill of exceptions is correct in all respects and is hereby settled and made a part of the record herein. Dated this the 10th day of November, 1916.

GORDON RUSSELL,
U. S. District Judge Presiding at the Trial.

(Endorsements:) No. 479(*b*).
Walter B. Grant, Sole Executor Estate of Frank B. Cotton, deceased, vs. Candelario Cordova.
The Bill of Exceptions of Plaintiff in Error, Candelario Cordova.
Filed Nov. 27, 1916. D. H. Hart, Clerk, by Saml. L. Kelly, Deputy.

103 In the District Court of the United States for the Western District of Texas, at El Paso.

No. 479B.

WALTER B. GRANT, Independent Executor of the Last Will and Testament of Frank B. Cotton, Deceased,

vs.

CANDELARIA CORDOVA.

Assignment of Errors.

I.

That the said United States District Court erred in sustaining the demurrer and exceptions of the plaintiff to the plea by the defendant to the jurisdiction of said court to try the title to the land involved in this suit, in that it was alleged in said plea that said land was situated south and southwest of the location of the Rio Grande during the year 1864, and prior to the great flood in said river of that year, and that the Boundary Commission constituted under the treaty of 1910 between the United States of America and the Republic of Mexico had decided on June 15, 1911, that the channel in which said river ran during the part of the year 1864 prior to the great flood of said year, was the boundary between said governments, which decision became operative by the terms of said treaty at the end of two years from the date of said decision, wherefore the said District Court had no jurisdiction to try said suit and determine either the title or right of possession of said land as between the plaintiff and the defendant.

II.

That said court, in any event, erred in sustaining said demurrer and exceptions to the defendant's said plea to the juris-
104 di-tion, in that if said decision was not effective to determine the boundary between said governments that nevertheless said plea showed to the Court, and the Court judicially knew that if said decision was not effective that the question of determining said boundary was pending before the respective political and executive departments of government, and was thereby withdrawn from the courts in all cases wherein a party defendant in court might allege and prove that he or she held under a Mexican title the land involved in the suit; the Court in the event that the defendant had not proved her title before the appointee Kiblinger, who was charged to ascertain as to said Mexican titles being authorized to proceed no further than to ascertain whether or not defendant had title under the government of Mexico which would support her claim of title if said land was yet within the territory of the sovereign which issued her title when said land was under said sovereignty.

III.

That said Court erred in refusing at the close by plaintiff of his case, to instruct a verdict for the defendant, in that it appeared from the date of the patent under which plaintiff claimed the land in controversy (which patent was issued by direction of a Statute of 1854) that the Rio Grande called for by the field notes of said patent was the said river as it ran in 1852-'3, and it appeared from the stipulation of the parties read in evidence by the plaintiff that the land sued for by plaintiff and claimed by the defendant is situated south and southwest of the channel of the said river as it ran in 1852 and 1853, and the plaintiff failed to adduce any evidence tending to show that any land south or southwest of said river channel of 1852-'3, had become a part of his survey by slow erosion of the western bank and accretion to the eastern or northern banks of said river, and because in view of the said treaty and declarations of the political and executive departments of this government, the question as to whether the change in said river's channel occurred
105 by slow erosion on the one side and accretion on the other, or by rapid erosion of the western or southern bank of said river, was an open question which had not been decided by either government for itself, and was subject to a-bitrament between said governments, and remained an open question at this time for determination, the Court could not judicially know more than the executive branches of the government had decided and presumed from the status really occupied by the executive department, that such change in the river channel was by slow erosion on the one side and slow accretion to the other side of the former channel of said river, and thus decide that the land in controversy was in the United States of America and became a part of plaintiff's land, when the two governments held the boundary between them as undetermined and expressly stipulated for a limited tentative exercise of de facto jurisdiction by the United States, which precluded the court from deciding for the purpose of adjudicating title to land the boundary question which the governments had not determined between themselves, and which neither assumed to determine for itself without agreement with the other, and hence if said court might try the title to said land before the government had determined the boundary, it must hear and rest its decision on evidence as to whether or not there was accretion to plaintiff's land of that formerly owned by the defendant.

IV.

The Court erred in refusing the motion of defendant for an instructed verdict for defendant at the conclusion of the evidence adduced by the plaintiff, and the defendant, in that it appeared from the testimony adduced by plaintiff, as well as that adduced by defendant, and without dispute or controversy as to the facts, that the land sued for by plaintiff and described in his petition only by its

exterior boundaries, had been formed into an addition to the City of El Paso, during or prior to the year 1882, when it was di-
106 vided into lots and blocks and streets and alleys were dedicated to the public so that the plaintiff had no possession of said streets when this defendant took possession of said land and was not ousted therefrom by this defendant, nor had plaintiff when said suit was instituted, or since then, any right of possession of said streets, and the plaintiff not having described or sued for lots or blocks in said addition, but having sought a recovery of the entire ground embraced in the field notes set out in his petition, including streets and alleys, the plaintiff was not entitled in an action of Trespass to Try Title provided for by the Statutes of Texas to recover possession of the streets and alleys in said addition, and not having sued for lots or blocks by such description as would enable him to obtain a judgment for lots and blocks, he must fail in this action.

V.

The said Court erred in refusing to submit to the jury the question as to the existance and authenticity of the Mexican title claimed under by defendant, as requested by the defendant, the defendant being unable to produce in court said title, but having adduced sufficient evidence of its existence and authenticity to support a finding by the jury in her favor on that issue.

F. G. MORRIS,
Attorney for Defendant.

(Endorsements:) No. 479B.
In the District Court of the United States for the Western District of Texas, at El Paso.
Walter B. Grant, Independent Executor of the Last Will and Testament of Frank B. Cotton, Deceased, vs. Candelaria Cordova.
Assignment of Errors.
Filed Oct. 14, 1916. D. H. Hart, Clerk, by S. L. Kelly, Deputy.

107 In the District Court of the United States for the Western District of Texas, El Paso Division.

No. 479-B.

WALTER B. GRANT, Independent Executor of the Last Will and Testament of Frank B. Cotton, Deceased,

vs.

CANDELARIA CORDOVA, Defendant.

Comes now the above named defendant by her attorney, and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above entitled cause in said court at its term being held in the Western District of Texas, at El Paso, commencing on the 2nd day of October, A. D., 1916, on the

5th day of October, 1916, manifest error hath happened to the great damage of said defendant. That there is involved in the rendition of said judgment the validity and construction of the treaty entered into between the United States of America and the Republic of Mexico on the — day of June, 1910, which was made under authority of the United States.

Defendant shows to the court that she has filed herewith her assignment of error complained of in this court.

Wherefore, said defendant prays for the allowance of a Writ of Error from the Supreme Court of the United States, and for an order fixing the amount of bond for a supersedeas in said cause, of such bond, and for such other orders and process as may cause the same to be corrected by the said United States Supreme Court.

October 12, 1916.

F. G. MORRIS,
Attorney for Defendant.

(Endorsements:) No. 479B. In the District Court of the United States for the Western District of Texas at El Paso. Walter B.
108 Grant, Independent Executor of the Last Will and Testament of Frank B. Cotton, Deceased, vs. Candelaria Cordova. Petition for Writ of Error. Filed Oct. 14, 1916. D. H. Hart, Clerk, by S. L. Kelly, Deputy.

109 No. 479-B (C. C.).

WALTER B. GRANT, Independent Executor of the Last Will and Testament of Frank B. Cotton, Deceased,

vs.

CANDELARIA CORDOVA.

Upon motion of F. G. Morris, Esq., attorney for defendant, upon filing a Petition for a Writ of Error and an Assignment of Errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Supreme Court the judgment heretofore entered herein, and the amount of bond on said Writ of Error be and hereby is fixed at Five Thousand ($5,000.00) Dollars to operate as a supersedeas upon its approval.

GORDON RUSSELL,
U. S. Dist. Judge, Presiding.

(Endorsements:) No. 479-B.

Walter B. Grant, Independent Executor of the Last Will and Testament of Frank B. Cotton, Deceased vs. Candelaria Cordova.

Order allowing writ of error and fixing supersedeas bond.

Entered and filed Oct. 14, 1916. D. H. Hart, Clerk, by S. L. Kelly, Deputy.

110 In the District Court of the United States for the Western District of Texas at El Paso.

WALTER B. GRANT, Independent Executor of the Last Will and Testament of Frank B. Cotton, Deceased,

vs.

CANDELARIA CORDOVA.

Know all men by these presents that we, Candelaria Cordova, as principal, and M. Melvin, Duncan Campbell and H. W. Pontius, sureties, are held and firmly bound unto Walter B. Grant, as Independent executor and Trustee of the Estate of Frank B. Cotton, deceased, plaintiff in the above named cause, in the sum of Five Thousand Dollars to be paid to the said Walter B. Grant as such Executor and Trustee his successors, executors and administrators, to which payment well and truly to be made we bind ourselves and each of our successors, representatives, and assigns, firmly by these presents:

Whereas the above named defendant, Candelaria Cordova, has sued out a Writ of Error to the United States Supreme Court to reverse the judgment in the above entitled cause by the District Court of the United States for the Western District of Texas;

Now therefore, the condition of this obligation is such that if the above named Candelaria Cordova shall prosecute said writ of error to *the* effect and answer all costs and damages, if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Witness our hands, this the — day of October, 1916.

M. MELVIN.
DUNCAN CAMPBELL.
H. W. PONTIUS.

The foregoing bond is approved this the 21st day of October, 1916.

GORDON RUSSELL, *Judge.*

111 (Endorsements:) No. 479B.

In the District Court of the United States for the Western District of Texas, at El Paso.

Walter B. Grant, Independent Executor of the Last Will and Testament of Frank B. Cotton, Deceased, vs. Candelaria Cordova.

Writ of Error Bond.

We do not desire to contest affidavits of solvency of within bondsmen. Beall, Kemp & Nagel, for Plaintiff.

Filed Oct. 21, 1916. D. H. Hart, Clerk, By Saml. L. Kelly, Deputy.

112 No. 479-B.

WALTER B. GRANT, Independent Executor of the Last Will and Testament of Frank B. Cotton, Deceased, Plaintiff,

vs.

CANDELARIA CORDOVA, Defendant.

It is ordered by the Court that the Writ of Error Bond, tendered herein by the defendant Candelaria Cordova, be, and the same is hereby, approved to operate as a supersedeas.

GORDON RUSSELL,
United States District Judge presiding.

Oct. 21, 1916.

(Endorsements:) No. 479B. Law.
United States District Court, Western District of Texas, El Paso Division.
Walter B. Grant, Independent Executor of the Last Will and Testament of Frank B. Cotton, Deceased, Plaintiff, vs. Candelaria Cordova, Defendant.
Order approving Writ of Error bond as supersedeas.
Filed and recorded, October 21st, A. D., 1916. D. H. Hart, Clerk, by Saml. L. Kelly, Deputy.

113 In the Supreme Court of the United States.

No. 479-B (C. C.)

CANDELARIA CORDOVA, Plaintiff in Error,

vs.

WALTER B. GRANT, Sole Executor of the Estate of Frank B. Cotton, Deceased, Defendant in Error.

It is agreed and stipulated herein by the respective attorneys of the parties hereto that in lieu of copying in full in the record in this case the original petition of the defendant in error and his foremer associate executor instituting this suit at law, that the same was in usual form of trespass to try title action under Texas statutory action wherein suit was instituted against a large number of occupants of the land sued for, which included the land for which plaintiff in error was sued by said plaintiff and it was filed in the United States Circuit Court for the Western District of Texas on the 29th day of August, 1908, and which is numbered 479 on the law docket of said court. A severance therein was granted this plaintiff in error and the case proceeded as between her as defendant and the defendant in error as plaintiff, as appears from the record.
It is agreed that this stipulation be copied into the record to

subserve all the purposes of a copy of the original petition, which has been substituted by amended pleading.

F. G. MORRIS,
Attorney for Plaintiff in Error.
BEALL, KEMP AND NAGLE,
Attorney- for Defendant in Error.

Endorsement: Filed Jan. 2, 1917. D. H. Hart, Clerk, by Saml. L. Kelly, Deputy.

114 In the Supreme Court of the United States.

No. 479-B.

In Re WALTER B. GRANT, Sole Executor of the Estate of Frank B. Cotton, Deceased,

vs.

CANDELARIA CORDOVA.

In the United States District Court in and for the Western District of Texas, El Paso Division.

THE UNITED STATES OF AMERICA, *ss:*

To Walter B. Grant, Sole Executor of the Estate of Frank B. Cotton, Deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the 18 day of January next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Texas, wherein Candelaria Cordova is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Austin in the district above named, this 19th day of December, in the year of our Lord one thousand nine hundred and sixteen.

Signed this the 19th day of December, A. D. 1916.

T. S. MAXEY,
Judge of the District Court of the United States for the Western District of Texas.

Attest:

[The Seal of the U. S. District Court, Western Dist. Texas, El Paso.]

D. H. HART, *Clerk.*

We accept service of foregoing citation in error this — day of December, 1916.

BEALL, KEMP & NAGLE,
Attorneys for Defendant in Error.

Dec. 22, 1916.

115 [Endorsed:] No. 479-B (C. C.) In the Supreme Court of the United States.
Caldelaria Cordova, Plaintiff in Error, vs. Walter B. Grant, Sole Executor of the Estate of Frank B. Cotton, Deceased, Defendant in Error.
Citation in Error.
Filed Dec. 19, 1916. D. H. Hart, Clerk, by Saml. L. Kelly, Deputy.

116 In the Supreme Court of the United Etates.

No. 479-B.

In Re WALTER B. GRANT, Sole Executor of the Estate of Frank B. Cotton, Deceased,

vs.

CANDELARIA CORDOVA.

In the United States District Court in and for the Western District of Texas, El Paso Division.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Judge of the District Court of the United States for the Western District of Texas, El Paso Division, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you, between Walter B. Grant, Sole Executor of the Estate of Frank B. Cotton, Deceased, plaintiff, and Candelaria Cordova, defendant, a manifest error has happened to the great damage of the said Candelaria Cordova as by her complaint appears; we, being willing that the error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the — day of —— next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct the error, what of right, and according to the laws and customs of the United States, should be done.

117 Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 19th day of December, in the year of our Lord one thousand nine hundred and sixteen, and of the independence of the United States of America the one hundred and fortieth.

[The Seal of the U. S. District Court, Western Dist. Texas, El Paso.]

D. H. HART,
Clerk of the District Court of the United States for the Western District of Texas, El Paso Division.

Allowed this the 19th day of December, A. D. 1916.

T. S. MAXEY,
United States District Judge.

118 [Endorsed:] No. —. In the Supreme Court of the United States.

Candelaria Cordova, Plaintiff in Error, vs. Walter B. Grant, Sole Executor of the Estate of Frank B. Cotton, Deceased, Defendant in Error.

Writ of Error.

Filed Dec. 19, 1916. D. H. Hart, Clerk, by Saml. L. Kelly, Deputy.

119 *Clerk's Certificate.*

THE UNITED STATES OF AMERICA,
Western District of Texas, ss:

I, D. H. Hart, Clerk of the District Court of the United States for the Western District of Texas, do hereby certify that the foregoing on one hundred and sixteen (116) pages, numbered 1-A, 1-B, 1-C, 1-D, and 2 to 113, both inclusive, contains a true and correct transcript in the order named of the following:

Caption.
Præcipe for transcript of record.
Order granting severance as to Candelario Cordova.
Plaintiff's Second Amended Original Petition.
Second Amended Original Answer of defendant Candelario Cordova.
Plaintiff's First Supplemental Petition.
Order designating and appointing Honorable Gordon Russell to act as judge of Western District of Texas until Dec. 1, 1916.
Order sustaining plaintiff's exceptions to defendant's plea to the jurisdiction of the Court.
Verdict of the jury.
Judgment of the Court.
Defendant's Bill of Exceptions.
Assignment of Errors.

Petition for Writ of Error.
Order allowing Writ of Error and fixing supersedeas bond.
Writ of Error Bond.
Order approving writ of error bond as supersedeas.
Agreement and stipulation of counsel as to omission of copy of Original Petition.

in cause Numbered 479-*b* (C. C.) on the law docket of said Court, wherein Walter B. Grant, Independent executor and trustee of the estate of Frank B. Cotton, deceased, is plaintiff and Candelaria V. de Cordova, is defendant, as the same appears on file and of record in this office at the El Paso Division of said Court, and being in accordance with the Præcipe filed and served herein by the plaintiff in error and the stipulation of counsel the defendant in error having failed to file any præcipe, and

I further certify that the original Writ of Error and the original Citation in Error are attached on the face of this Certificate and in the order given follow after the above mentioned page numbered 113 and are numbered 114, 115, 116, 117 and 118, certified copies thereof being left among the files in said cause in this office.

In testimony whereof I have hereunto set my hand and the Seal of said Court, at office in the City of El Paso, Texas, this the 13th day of January, A. D. 1917.

[The Seal of the U. S. District Court, Western Dist. Texas, El Paso.]

D. H. HART, *Clerk*,
By SAML. L. KELLY, *Deputy*.

Endorsed on cover: File No. 25,712. W. Texas D. C. U. S. Term No. 882. Candelaria Cordova, plaintiff in error, vs. Walter B. Grant, sole executor of the estate of Frank B. Cotton, deceased. Filed January 19th, 1917. File No. 25,712.

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Supreme Court of the United States

October Term, 1917.

No. 372.

CANDELARIA CORDOVA, *Plaintiff in Error,*
v.
WALTER B. GRANT, EXECUTOR ESTATE OF FRANK B. COTTON, DECEASED, *Defendant in Error.*

MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR, SUED OUT BY PLAINTIFFS IN ERROR IN THE ABOVE-STYLED CAUSE, TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

To the Honorable the Supreme Court of the United States:

Now comes Walter B. Grant, executor of the last will and testament of Frank B. Cotton, deceased, defendant in error of the above-styled cause, and respectfully prays that the writ of error heretofore sued out in the above-styled cause by Candelaria Cordova, plaintiff in error to the District Court of the United States for the Western District of Texas, may be dismissed for the following reasons:

(1) That by the plaintiff's second amended original petition, upon which the case was tried (transcript, pages 3-8), and by the answers of the defendant (transcript, pages 8-13), the jurisdiction of the

district court depended entirely upon the diversity of citizenship of plaintiff and defendant; and no question of jurisdiction having been certified by the court below for decision, this honorable court has no jurisdiction to review the case upon writ of error to the said district court.

(2) That in said plaintiff's second amended original petition, no issue was raised involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority.

(3) That the allegation in defendant's answer that the land in controversy was passed from Mexico to the north side of the Rio Grande River by rapid erosion and accretion, and that the defendant has a chain of title to the land running down from the Republic of Mexico and that she holds thereby a good title to the land, notwithstanding that the United States government exercises a *de facto* jurisdiction over the territory where the land is located (transcript, pages 9, 11, 12) does not raise a federal question or any question as to the validity or construction of any treaty, or the construction or application of the Constitution of the United States, and therefore this honorable court has no jurisdiction to review the judgment of the said district court.

W. B. Grant and
T. J. Beall,
Attorneys for
Walter B. Grant, Executor of the last will and testament of Frank B. Cotton, deceased,
Defendant in Error.

BRIEF OF THE DEFENDANT IN ERROR UPON THE MOTION TO DISMISS WRIT OF ERROR.

Statement.

The plaintiff's second amended original petition upon which the case was tried (transcript, pages 3-8) contains the usual formal allegations in the case of an action in trespass to try title. He alleges that he was seized and possessed of certain real estate in El Paso County, Texas, on the 1st day of July, 1907 (describing the premises by metes and bounds), in fee simple under certain deeds therein referred to, dated January 12, 1881, for a full consideration paid, and without any notice, record or otherwise, of any adverse title, and that the defendant unlawfully entered upon and dispossessed the plaintiff of said premises. He also alleges that he had peaceable, continuous and adverse possession of said real estate, paying the state, county, and municipal taxes thereon from January 12, 1881, up to the said 1st day of July, 1907, and he pleaded the statutes of limitations of three, five and ten years, and that he had by such possession acquired a good and sufficient title to said real estate independent of his said deeds.

In said petition (transcript, page 4), the plaintiff alleged that the controversy was wholly between citizens of different states, and claimed the jurisdiction of the district court only upon the ground of diversity of citizenship.

The defendant in her second amended answer (transcript, page 8), upon which the case was tried, pleaded to the jurisdiction of the court, setting up that she claimed the title and right to possession of certain lands included in the description set forth in the plaintiff's declaration, by virtue of said lands being located in the State of Chihuahua, Republic of Mexico, which is described by metes and bounds, and she set forth the alleged deeds under which she claimed

that right, being deeds covering certain lands which were in Mexico on the south or west side of the Rio Grande river before the same was washed away by erosion from the Mexican side and formed on the American side by accretion; that the question as to whether the plaintiff or defendant had title to the land depended on whether or not the said river as it changed its position to the west and south remained at all times the boundary between said two republics, and that if it should be decided that the land in dispute is not within the United States of America, then the plaintiff is without title even if he owns under title running down from the patents issued from the State of Texas, and must fail in the suit (transcript, page 11); the defendant, in her plea, states that "the United States government exercises at present a *de facto* jurisdiction over the territory where the land involved in this suit is located" (transcript, page 12). The defendant, for further plea, answered that she was not guilty of the wrongs and trespasses complained of; and by further plea set up an adverse, peaceable and continuous possession of the lands claimed, for more than ten years before the institution of the suit, and claimed that title was acquired by her predecessor in title by limitation, under the laws of the State of Texas (transcript, pages 12-13).

The plaintiff (defendant in error) excepted to the said plea of jurisdiction upon the ground that the plea to the jurisdiction shows upon its face that the United States of America and the State of Texas have and are exercising jurisdiction over the property in controversy, and that the same is now and long has been subject to the laws of the United States of America and the State of Texas, as is also known juridically to the court; the plaintiff further set forth that the United States, the State of Texas and the City of El Paso have always inforced their laws upon the said land in all respects, and the political and executive departments of the government now claim and have at all times claimed said land as being within the territorial limits of the United States of America and enforce the civil and criminal laws over said land (transcript, pages 13-15).

The cause came on to be heard upon the exceptions of the plaintiff to the defendant's plea of jurisdiction and said exceptions were sustained, to which ruling the defendant duly excepted (transcript, page 16).

The cause as originally brought by the plaintiff was against a great many defendants who were sued as trespassers and judgment taken against all except the present defendant (plaintiff in error), to whom was granted a severance (transcript, page 3), and one other, Pedro Gutierrez, who took exceptions at the trial and whose case is now pending in this honorable court, being No. 287 for the October term of 1917.

The bill of exceptions taken by the plaintiff in error in the trial court shows that the case was tried as any ordinary action of trespass to try title, or ejection, is tried, and plaintiff introduced his evidence in the trial court (transcript, pages 21-24, 41-54), showing title down from the sovereignty of the soil, to-wit, the State of Texas, and also showing title by possession of all the land sued for under the statutes of limitations of three, five and ten years; and it was admitted, upon trial of the cause, that the governments of the United States, the State of Texas, County of El Paso and City of El Paso are now and for many years past have been, and at the time of the institution of this suit and long prior thereto were and ever since said time have been, exercising and still are exercising government control and political jurisdiction over all the property described in plaintiff's petition; and that the United States of America and the State of Texas have enforced their laws during said time upon all of said lands, and have punished and still punish offenders for violation of said laws (transcript, page 24).

It was also admitted that plaintiff (defendant in error) had title to the patents known as Burdett Surveys, Nos. 1 and 2, and the mean conveyances down from the State of Texas, "and to all land, if any, which in law under the facts belongs to said surveys or either of them by accretion, defendant not admitting that there is any accretion thereto;

and that the land described in plaintiff's petition lies between the said east line of Survey No. 1 and the west line of Burdett Survey No. 2, and the northern boundary of said Surveys Nos. 1 and 2 and the present channel of the Rio Grande" (transcript, pages 23-24).

It was also shown by oral testimony of Millard Patterson and others that Frank B. Cotton and his associates, and, since his death, his estate, had had possession of said lands, including the property embraced in this cause, since 1881, and has paid taxes thereon continuously, and that said land is and has been embraced within the limits of the City of El Paso, subject to all its laws (transcript, pages 41-54).

The defendant (plaintiff in error) furnished oral testimony for the purpose of showing that the land now claimed by the defendant on this side of the river, is at the same terrestnal location as it used to be in Mexico as described in the deed to her alleged predecessors in title, and as it was before the Rio Grande river by erosion and accretion had placed it on the American side, but a reading of the testimony thus produced (transcript, pages 29-31) shows that the plaintiff utterly failed to locate the land as by the descriptions set forth in the said deeds described in her second amended answer (transcript, pages 8-11). The defendant also produced oral evidence tending to show that she and, before her, her husband, Pablo Cordova, had been in adverse, peaceable and continuous possession of the land for more than ten (10) years in support of her plea of title to the lands under the statutes of limitation of the State of Texas.

As bearing on the question of the dispute between the United States and Mexico as to whether a large tract of land embracing the southern part of the City of El Paso, Texas, in which the land in suit is located, formed by the shifting of the Rio Grande river, belongs to the territory of the United States or to that of Mexico, and as to whether the boundary between the two countries is the present channel of the river, there was introduced in evidence certain public documents and letters from the state department

and duly attested copies of letters which passed between the two governments (transcript, pages 24-27, 54-65), by which the following facts are shown, namely: That the location of the Rio Grande river which was the boundary line at this point between the United States and Mexico, under the treaty of Guadalupe Hidalgo was, in 1852, north of the land in dispute; that since 1852 the river had shifted by erosion and accresion to the south and west and a large tract of land had formed on the American side of the river which had become a part of the City of El Paso, Texas; that such land from the time of its formation had been under the *de facto* jurisdiction of the United States, and that its laws and those of the State of Texas, County and City of El Paso, both civil and criminal, had been enforced over said land in all respects; that in comparatively recent years persons claiming under Mexican titles appeared and asserted before the International Boundary Commission ownership of certain of the lands, and the matter received the consideration of that commission, who, in 1897, failed to reach any agreement in relation thereto; that many persons, some of whom claimed land under Mexican title, settled on the territory; that when it came within the contemplation of the two governments to terminate the matter by arbitration or otherwise, a *status quo* was placed upon the land by the state department and within a very few years thereafter the land became infested by squatters; although suits, including the present action, were brought to dispossess them no trial could be had because of the *status quo* existing; under these circumstances the United States government and that of Mexico entered into an agreement under which the state department appointed an officer, Wilbur Keblinger, Esquire, to pass upon the question of the existence of *prima facie* Mexican title and of the fact of actual possession thereunder on the part of persons on and claiming land, and if such persons were not able to show such title and possession, the United States was not called upon to interfere to prevent ejectment proceedings in their cases (transcript, pages 57, 58); that said officer investigated the claims of the defendants named in the instant case, including this defendant (plaintiff in error here), and reported to the department of state on March 11, 1912, that the defendant and other defendants had failed

to furnish such a Mexican title as required by the agreement between the United States and Mexico for the maintenance of the *status quo*, and that the United States was not called upon to prevent ejectment proceedings in this case (transcript, page 65). Under date of March 14, 1912, the department of state approved the report of such officer (transcript, page 64).

Said written evidence also showed that a treaty was entered into between the United States and Mexico under date of June, 1910, under which a presiding commissioner of the International Boundary Commission, a resident of Canada, was designated to sit with the Mexican and American commissioners "to terminate * * * the differences which had arisen * * * as to the international title to the Chanizal tract" (transcript, page 54). A finding was made *on June 15, 1911*, by the majority of said commission, the presiding commissioner and the Mexican commissioner, which in substance was that the international title to a portion of said Chanizal tract was in the United States and international title to the balance was in Mexico, the line between the two to be established as the center of the river as it existed in 1864, before the flood of that year, and said commissioners reported that they had not located and they conceived that it was not in their province to relocate that line (transcript, pages 26, 27). The American commissioner dissented from that opinion (transcript, pages 40, 41). The United States did not accept the award of the majority commissioners because it was not valid or binding and because it had confessedly failed to accomplish the object which the High Contracting Parties had in view, namely, 'to *terminate* * * * the differences * * * which have arisen * * * as to the international title to the Chanizal tract,' inasmuch as it makes no attempt to locate the boundary line at the tract in dispute, and its effect is to remit once more this all-important matter to the two parties for settlement" (transcript, page 54). Negotiations were again entered into between the two governments in regard to the matter (transcript, page 55).

There was also introduced in evidence at the trial a letter from the acting secretary of state, dated July 8, 1916, in which it stated that the attitude of the department of state with respect to the award made by the International Boundary Commission, United States and Mexico, in the Chanizal case in 1911, was unchanged (transcript, page 54).

The district court submitted the case to the jury, instructing it, among other instructions, that the plaintiff was entitled under the evidence to recover the land sued for unless the jury should find for defendant on her plea of the statute of limitations, and refused to instruct the jury as requested by counsel for the defendant, that if the jury should find from the evidence that the defendant had a regular chain of deeds from and under the government of Mexico the jury would return a verdict so stating (transcript, page 67).

The jury returned a verdict in favor of the plaintiff for the land in controversy (transcript, page 18).

The case comes to this court for decision upon the assignment of errors (transcript, pages 68-70). There is no certificate of the trial judge of jurisdiction issues.

ARGUMENT AND AUTHORITIES.

If the plaintiff in error is entitled to a hearing in this honorable court upon her writ of error it is because the case falls within the scope of clauses one, three or four, of section 238, Judicial Code, approved March 3, 1911. The other clauses of that section have no application to the case.

1. No question of jurisdiction arising from diversity of citizenship

is before this court under clause one of said section 238 because there is no certificate of the district court as required by said clause one, the case coming here under writ of error allowed in the usual and general form to review the judgment of the court below. Such certificate is indispensable.

Chapell v. United States, 160 U. S., 499.
Colin v. Jacksonville, 207 U. S., 582.

2. No question involving the Constitution of the United States

under clause three of Section 238 of Judicial Code was drawn in question or appears by the record. The action was brought by the plaintiff upon the ground solely of diverse citizenship. The answer raises no constitutional question, nor is any such question claimed in the pleadings.

Each assignment of error relates to and endeavors to present in a different form the alleged error of the trial judge in holding that the question of whether the land in dispute was in Mexico or the United States, was not open to the defendant for trial before the courts, in view of the fact that the government of the United States and the State of Texas claimed possession, control, and jurisdiction over the property in dispute, and that the question was one for

decision only by the political or executive branch of the government. *This raised no constitutional question.*

The case was brought in the United States court solely on the question of diversity of citizenship. Whether the federal court had jurisdiction on grounds other than diversity of citizenship must be determined from complainant's own statement as set forth in the pleading affirmatively and distinctly, regardless of questions subsequently arising; grounds of jurisdiction may not be inferred argumentatively.

Lovell v. Newman, 227 U. S., 412.
Shultis v. McDougal, 225 U. S., 561, 569.
Omaha Electric Co. v. Omaha, 230 U. S., 123, 124.
Filhiol v. Torney, 194 U. S., 357.
Devine v. Los Angeles, 202 U. S., 313, 332.

The allegations of the defendant in general terms, without the showing of material and substantial jurisdictional facts, are not sufficient to raise a question for decision of this court under said section 238 of the Judicial Code.

In *Spencer v. Duplan Silk Co.,* 191 U. S., 526, the court says:

> "A suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or validity or construction of the laws or treaties of the United States upon the determination of which the result depends and which appears in the record of plaintiff's pleadings."

In *Brown v. Keene,* 8 Peters, 112, the court says:

> "The decisions of this court require that the averment of jurisdiction shall be positive, and that the declaration shall state expressly the facts on which the jurisdiction depends."

See also

Muse v. Arlington Hotel Co., 168 U. S., 430.
Ex parte Smith, 94 U. S., 455.

Colorado Central Consolidated Mining Co. v. Turck, 150 U. S., 138.
Press Publishing Co. v. Monroe, 164 U. S., 105.

3. No question involving the validity or construction of a treaty

is presented by the pleadings or evidence. Although the answer of defendant and request for instruction to the jury in effect refer to the treaty of June , 1910, and to the action of the Boundary Commissioners thereunder, yet it is manifest from the statement of facts that no question as to the validity or the construction of the same is raised, and it being a political and not a judicial question, none such can be raised, and hence no reason exists for bringing the case to this honorable court under clause four of said section 238 of the Judicial Code.

If the plaintiff in error alleges that a reference to the treaties between Mexico and the United States in their pleadings is sufficient to raise a question of construction and validity of a treaty, we remark that it has been held that mere allegations not based upon the facts presented, showing wherein the construction and the validity of the treaty are involved or are drawn in question, do not create a case under clause four, section 238, of the Judicial Code.

Budzisz v. Illinois Steel Co., 170 U. S., 41.

4. As bearing upon all the questions here presented,

we submit that neither the trial court nor this honorable court has jurisdiction to hear and determine the question as to whether the changes in the river left the land in dispute as territory of the United States or of Mexico. It was admitted (transcript, page 24) that the United States, the State of Texas, County and City of El Paso, have always since the land was formed on the north of the Rio Grande river, exercised government control and political jurisdiction over all the property described in plaintiff's petition;

and have enforced their laws during said time upon all of said land. It was also shown as incident to such exercise of jurisdiction on the part of the United States, that by agreement with Mexico an officer had been appointed with the approval of both governments, to pass upon the question of the existence of a prima facie Mexican title on the part of the defendant (plaintiff in error) to the land in question (transcript, page 57), and that such officer had reported that the plaintiff had failed to furnish such a Mexican title as required by the agreement between the United States and Mexico for the maintenance of the *status quo,* and that, "The United States is not called upon to interfere to prevent ejectment proceedings" (transcript, pages 64, 65). The defendant (plaintiff in error) by its answer (transcript, pages 8-9) set forth, "that the question of title and right of possession involved in the case necessarily involves a trial and decision by this court as to the true location of the international boundary between the United States of America and the Republic of Mexico," and claimed that the plaintiff (defendant in error) could not recover possession of the land providing it was found by the court that the land is located within the boundaries of the Republic of Mexico.

This question thus raised is not a judicial, but a political question. We cannot see how it can be seriously argued that this proposition presents a case that involves the validity or construction of any treaty within the purview of clauses three and four of section 238 of the Judicial Code.

There have been two cases before this honorable court which involved the identical question concerning the identical land included in this suit, or land adjacent thereto.

Warder v. Loomis, 197 U. S., 619.
Warder v. Colton, 207 U. S., 582.

The said Warder was sued in the latter case in an action of trespass to try title by the present plaintiff and his co-executor, now deceased, and judgment was obtained against him in the circuit court notwithstanding his plea that the said land was formed by avulsion and was within the limits of the Republic of Mexico. This court upon motion dis-

missed the writ of error therein for want of jurisdiction. The other case involved the same question and was similarly dismissed. The present case furnishes no new condition. The question of the location of the boundary line is now a matter of negotiations toward a diplomatic settlement by the executive branches of the two governments (transcript, pages 54, 55).

It has been held in many decisions of this court that it is the political departments of the government that must determine the line of the boundary between nations; and the assertion of the political departments of the United States of jurisdiction over the territory including the disputed land binds the hands of the courts, and leaves no question under the Constitution, or arising under treaties, open for the decision of the trial court or for the decision of this honorable court.

In the case of the *United States v. Arredondo,* 6 Peters (31 U. S.), 691, 711, the United States supreme court said:

> "This court does not deem the settlement of boundaries a judicial, but a political question, and it is not its duty to lead, but to follow the action of other departments of the government."

In *Foster v. Neilson,* 2 Peters, 253, certain facts were shown indicating that the United States government had perseveringly claimed that the territory in issue belonged to the United States, and exercised acts of sovereign power over the same. At page 309, the court says:

> "After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments, which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its right of dominion over a country of which it is in possession, and which it claims under a treaty, if the legislature has acted on the construction thus asserted, it is not

in its own courts that this construction is to be denied."

In *Jones v. United States,* 137 U. S., 202, at page 212, the United States supreme court says:

> "Who is the sovereign, *de jure* or *de facto,* of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects, of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances."

See also, to the same effect:

United States v. Texas, 143 U. S., 621, 628.
La Roche v. Lessee of Jones, 9 How, 154.
Lessee of Latimer v. Poteet, 14 Peters, 16.
Luther v. Borden, 7 How., 56.
Harrold v. Arrington, 68 Tex., 238.

It is therefore respectfully submitted that the case having been brought in the district court of the United States upon the ground of diversity of citizenship, and the answer raising no federal question such as is contemplated by section 238 of Judicial Code, the writ of error should be dismissed for want of jurisdiction on the part of this honorable court.

W. B. Grant,
T. J. Beall,
Attorneys for
Walter B. Grant, Executor of the estate of Frank B. Cotton, deceased,
Defendant in Error.

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In the Supreme Court of the United States

OCTOBER TERM, 1917.

CANDELARIA CORDOVA, PLAINTIFF IN ERROR,

vs.

WALTER B. GRANT, SOLE EXECUTOR OF THE ESTATE OF FRANK B. COTTON, DECEASED, DEFENDANT IN ERROR.

REPLY BY PLAINTIFF IN ERROR TO MOTION TO DISMISS FOR WANT OF JURISDICTION.

The motion of defendant in error to dismiss the writ of error for want of jurisdiction makes a plausible showing only by omission in the statement of the case of every pleading and exception on which plaintiff in error relies to maintain the jurisdiction of this court. The omissions are so important as to require a re-statement of the case.

Counsel for plaintiff in error filed his brief in this case before he was served with the motion to dismiss. He therefore requests the court to take the brief in considering the motion and his answer thereto.

Counsel for the plaintiff in error before stating the portions of the record relied upon to sustain the jurisdiction of this court, will briefly state the propositions of law on which he relies to sustain the jurisdiction of this court.

I.

That under the fourth clause of section 238 of the Judicial Code, which confers jurisdiction on this court "in *any case* in which * * * * * * * the validity or construction of any

treaty made under its (the United States') authority is drawn in question" does not exclude but embraces cases in which such a federal question arises under a plea to the jurisdiction as well as when the federal question arises on the merits; and as this court has jurisdiction of the whole case when there is drawn in question the construction of a treaty of the United States, without regard to the stage of the case in which the question arises, it is not necessary in such cases, even when the federal question arises on a plea or ruling as to the jurisdiction of the trial court, to bring up the case on a certificate of the trial court.

II.

That when the plea though denominated a plea to the jurisdiction raises a federal question which really requires an examination into the facts on the merits in order to determine whether the question raised will arise in the case, the plea is substantially one on the merits, and raises a federal question on the merits, and the order of the court, in such a case, sustaining a demurrer or exception to the plea is substantially a ruling on the merits.

Scully v. Bird, 209 U. S., 481;
Illinois C. R. Co., v. Adams, 180 U. S., 28.

III.

Aside from the plea to the jurisdiction there was on the trial to the merits of the case drawn in question, the construction of treaties of the United States.

STATEMENT.

The defendant in error in his statements in support of his motion to dismiss has omitted every part of the case wherein the construction of a treaty is drawn in question, and we shall have to restate the whole case, even that stated by defendant in error, in order to bring before this court a connected showing of the facts.

The plaintiff's petition instituting this suit was in the ordinary form of actions of trespass to try title under the statute

of Texas, which statute is printed later in this reply.

The defendant pleaded as follows, omitting the caption:

"This defendant comes now and pleads to the jurisdiction of the court as she did plead in her former answer with less elaboration, and shows to the court that she claims the right of possession of the lands hereinafter described, which the plaintiff claims is embraced within the chain of title under which plaintiff claims. That the question of title and right of possession involved in the case necessarily involves a trial and decision by this court as to the true location of the International boundary between the United States of America and the Republic of Mexico, that is to say that the plaintiff claims the land involved in this suit under a regular chain of title from the State of Texas to the land in controversy, and this defendant, who is the surviving widow of Pablo Cordova, deceased, who died intestate, claims the right of possession under the title of her sons Adolfo Cordova and Jose Cordova, who are the sole heirs at law of Pablo Cordova, deceased, who owned it as his separate property at the time of his death, and was at the time of his death in possession of the land hereinafter described, and of which this defendant, in the right and by the permission and consent of her said sons, together with them, has ever since been possessed under a regular chain of title under the duly constituted authorities for the transmission of such title under the Republic of Mexico and the State of Chihuahua therein." (Rec. p. 8.)

Each of the tracts claimed was described by reference to adjoining tracts, naming the original grantee of each tract from the Mexican Government. (Rec. 8-12.) And it was further alleged:

"That all of said land is situated west of the Rio Grande as it was located and established by Messrs. Emory and Salazar, commissioners respectively of the United States of America and the Republic of Mexico, as the boundary established between said governments in A. D. 1852 and 1853, and all of said land was situated in the State of Chihuahua and Republic of Mexico in 1852 and at all times prior thereto and during the existence of Mexico. That since the year 1852, the Rio Grande has established its location many hundreds of yards south or southwest of the land in controversy so that the land

involved in this suit is now situated north and east of the present Rio Grande channel and the question on which the title claimed under by the plaintiff depends, and on which the record title of defendant's sons and her right of possession depends is whether or not the said river so changed its position as to be considered as remaining at all times the boundary between said two republics, or so changed its location as that the boundary of 1852 or some position between that boundary and the present bed of said river and south of the lands, or south of some of the lands, involved in this suit, is the present boundary between the United States of America and the Republic of Mexico. That if it should be decided that the land in dispute is not within the United States of America, then the plaintiff is without title, even if he owns all such title as the patents under which he claims passed from the State of Texas (which defendant does not admit but denies), and must fail in the suit whether defendant has title or right of possession, or not; and she being in possession is entitled to remain in possession as between herself and the plaintiff, and if defendant's sons, under whom she holds, have title under the Government of Mexico, their title must protect them. *And this defendant shows to the court that while in the absence of treaties vesting the jurisdiction to determine such boundary question in specially designated authorities,* this court might try this case and determine said boundary question as it had been determined by the political or executive departments of this Government, if such political and executive departments had determined and decided such boundary question, yet this defendant shows to the court that while the United States Government exercises at present a de facto jurisdiction over the territory where the land involved in this suit is located, that it does not exercise said jurisdiction under claim that said boundary exists at the present bed of the Rio Grande but expressly with the admission *in its treaties* and departmental correspondence with the authorities of Mexico, that said boundary is unsettled and undetermined in such manner as to present an open question for decision by the respective political or executive departments of said governments so that the ordinary probative force or conclusiveness on the courts of the exercise of a de facto jurisdiction does not obtain in this instance. And furthermore, this defendant shows to the court that the *treaties* and acts of the respective governments placing said boundary dispute within the jurisdiction of cer-

tain special authorities, of which this court must take judicial notice, *must necessarily have deprived the courts of each of said republics of jurisdiction to decide litigation between private claimants* with respect of land situated within the disputed area, wherein it is necessary to decide as to the true location of the boundary between said governments in order to determine the question of title involved.

"Wherefore, this defendant prays that this court refuse to exercise jurisdiction to try this cause, and that this court either dismiss this cause for want of jurisdiction *or enter an order staying a trial of this cause until the said boundary between said governments shall be established.*" (Rec. 11-12.)

The defendant also pleaded the general issue "not guilty" and the Texas statute of limitations of ten years as his defense if his plea to the jurisdiction should be over-ruled, without waiving exception to the ruling on the plea to the jurisdiction, this being according to Texas practice which requires all pleas and defenses to be filed together but in due order of pleading. (Rec. 12-13.)

The plaintiff filed a general exception or demurrer to the sufficiency of defendant's plea to the jurisdiction of the court. (Rec. 13.)

The plaintiff below further pleaded as follows in reply to defendant's pleadings as to the boundary question to which the treaties related:

"This plaintiff says that while it is true that *there was an attempt to determine by arbitration a dispute as to the international boundary line between the United States of America and the United States of Mexico* at and in the neighborhood of the land in controversy in this case that the said *arbitration failed* and that the United States Government declined to acknowledge any settlement *by the arbitral court* and that the said *arbitral court* wholly failed to find and determine the said boundary line or to locate the same so that it might be known to either government or any citizen thereof; that ever since such failure on the part of the court of arbitration, the Government of the United States has held (and had theretofore held) the said land and now holds and exercises jurisdiction thereover; and that the Government of the State of Texas and said City of El Paso enforce their laws upon the said land in

all respects; that prior to the said arbitration proceedings, at least the hearing before the court of arbitration, the Government of the United States and the Government of Mexico duly entered into an agreement whereby one Wilbur Keblinger was authorized and empowered to investigate the matter of occupancy of said land by persons claiming the same either under the laws of the United States of America and State of Texas, or under the laws of the Republic of Mexico of Chihuahua thereof, and that it was then and there agreed by and between the two governments that suits might be instituted and maintained in the Courts of the United States and State of Texas involving the rights to the title and possession of any lands within the disputed area, which the said Keblinger should hold to be proper subjects and litigation of the courts of the United States of America or of the State of Texas, and under and by virtue of the authority given him by the two governments he heard and determined that the dispute between this plaintiff and the defendant herein, Candelaria V. de Cordova, is properly justiciable for the courts of the United States of America and the State of Texas, and that his finding has been acquiesced in by both Governments.

"This plaintiff says that as hereinbefore stated the land is within the territorial jurisdiction of the United States of America, that is to say within the land over which this Government is exercising dominion and control, that in a controversy existing between plaintiff and defendant as to the title and possession of said land it is necessary a tribunal should exist somewhere for the determination of their respective rights, that in law and in fact, the only tribunal which could determine their rights and exercise jurisdiction over said property is the Court of the United States of America, for the Western District of Texas; that the political and executive departments of said Government now claim and have heretofore at all times claimed said land as being within the territorial limits of the United States of America and enforce the Civil and Criminal laws over said land.

"Therefore, this Court has and should exercise the jurisdiction to determine the controversy between the parties herein."

The court sustained the general exception of plaintiff be-

low to defendant's plea to the jurisdiction of this court, as a plea to the jurisdiction, but heard testimony on the trial under said plea and the above pleading of plaintiff below and under the general issue in relation to the matters pleaded, as follows:

"The plaintiff below read in evidence the two patents to N. W. Burdett under which he claimed, and the following stipulation of counsel:

"It is agreed that the plaintiff shall offer in evidence without objection the patents to the N. W. Burdett Survey Number One, N. W. Burdett Survey Number Two and the Merchants and Thomas Survey, duly filed in this cause, and that by the terms of said patents and each of them from the State of Texas and all of the mesne conveyances to the plaintiff, the Rio Grande River is called for as the Southern boundary of said surveys and each of them; and that plaintiff has title to the Burdett Surveys Nos. 1 and 2 under said patents and the mesne conveyances, and to all land, if any, which in law under the facts belongs to said surveys or either of them by accretion, defendant not admitting there is any accretion thereto; and that the land described in plaintiff's petition lies between the said East line of survey No. 1 and the West line of Burdett Survey No. 2, and the Northern boundary of said Surveys Nos. 1 and 2 and the present channel of the Rio Grande.

"And it is further agreed that the defendant, Candelaria V. de Cordova, now has possession of a part of the land described in plaintiff's petition, and that all of the land of which the defendant, Candelaria V. de Cordova has possession, which is described in plaintiff's petition, lies between the present channel of the Rio Grande River, and the channel of the said Rio Grande River as it existed in 1852, and that such portion of said land as defendant has possession of lies between the northern boundary of said N. W. Burdett Survey No. 2 and the present channel of the Rio Grande River.

"That the United States, the State of Texas, County of El Paso and City of El Paso are now, and for many years past have been, and at the time of the institution of this suit and long prior thereto were, and ever since said time have been

exercising government control and political jurisdiction over all of the property described in plaintiff's petition; and that the United States of America and the State of Texas have enforced their laws during said time upon all of said land, and have punished and still punish offenders for violations of said laws." (Rec. 23-24.)

As the stipulation shows that the land in controversy was on the Mexican side of the Rio Grande in 1852-3, when the river as it then ran was the International boundary and as plaintiff's patents were issued in 1858 under statutes of 1854 (Rec. 21-23), it must be understood that the calls in the patents for the river referred to the Rio Grande of 1852-3, as no change was shown to have occurred until after 1858.

The plaintiff rested, and the defendant thereupon moved the court to instruct the jury to return a verdict for the defendant upon the ground that the field notes of neither of the surveys patented to N. W. Burdett were proved to embrace the land sued for and described in plaintiff's petition, which motion was by the court refused, and the defendant then and there excepted to such refusal to give such peremptory instruction. (Rec. 24.)

And thereupon the defendant proceeded to offer in evidence her testimony as follows:

The defendant read in evidence the conclusions of the majority of the Boundary Commission acting under Treaty between the United States and Mexico of 1910 though not all of the opinion, said decision having been rendered on June 15, 1911, to-wit:

CONCLUSION OF INTERNATIONAL BOUNDARY COMMISSION AWARD.

"The Presiding Commissioner and the Mexican Commissioner consider that the changes referred to in this testimony cannot by any stretch of the imagination, or elasticity of language, be characterized as slow and gradual erosion.

"The case of Nebraska v. Iowa (143 U. S. 359) decided by the Supreme Court of the United States in 1892 is clearly distinguishable from the present case.

"In Nebraska v. Iowa the court applying the ordinary rules of international law to a fluvial boundary between two states, hold that while there might be an instantaneous and obvious dropping into the Missouri River of quite a portion of its banks, and while the disappearance, by reason of this process, of a mass of bank might be sudden and obvious, the accretion to the other side was always gradual and by the imperceptible deposit of floating particles of earth, the conclusion was therefore, that notwithstanding the rapidity of the changes in the course of the channel, and the washing from the one side onto the other, the law of accretion controlled on the Missouri River as elsewhere. In the present case, however, while the accretion may have been slow and gradual, the parties have expressly contracted that not only the accretion, but the erosion must have been slow and gradual.

"The Convention of 1884 expressly adopts a rule of construction which is to be applied to the fluvial boundary created by the treaties of 1848 and 1853, and this rule is manifestly different from that which was applied in the case of Nebraska v. Iowa, in which the court was not dealing with a special contract. If it had been called upon, in the case just cited, to decide whether the degradation of the bank of the Missouri River had occurred through a slow and gradual process, the answer would undoubtedly have been in the negative.

"In the case of St. Louis v. Rutz (130 U. S. 226) the Supreme Court of the United States dealing with facts very similar to those established by the evidence in the present case, found that the washing away of the bank of the Mississippi River did not take place slowly and imperceptibly, but on the contrary the caving in and washing away of the same was rapid and perceptible in its progress; that such washing away of said river occurred principally at the rises of the floods of high water in the Mississippi River, which usually occurred in the spring of the year; that such rises or floods varied in their duration, lasting from four to eight weeks before the waters of the river would subside to their ordinary stage or level; that during each flood there was usually carried away a strip of land from off said river bank from 240 to 300 feet in width, which loss of land could be seen and perceived in its progress; that as much as a city block could be cut off and washed away

in a day or two, and that blocks or masses of earth from ten to fifteen feet in width frequently caved in and were carried away at one time.

"If the degradation of the bank of the Mississippi River, above described, was found by the Supreme Court not to be slow and imperceptible progress, it is difficult to understand how the destruction of land, houses, and forests, described by the witnesses in the present case can be regarded as samples of slow and gradual erosion.

"Now can the presiding Commissioner and the Mexican Commissioner give effect to the contention that Mexico must be held to have put a construction on the words 'slow and gradual' in the preamble of the Banco Treaty of 1905, which adopted the report of the Commissioners, stating that the changes producing the bancos were due to slow and gradual erosion coupled with avulsions, although it is alleged by the United States that the erosion in that case was even more violent than that which occurred at the Chamizal. The report rendered by the Commissioners to their respective Governments in no way discloses any facts tending to show the nature and extent of the erosive changes, and properly so, because that was not material to the question to be decided. It is true that, by making a minute examination of the plans accompanying the report, the actual extent of the erosive changes might have been ascertained, but there certainly was nothing in the question submitted to the governments for solution to necessitate or even suggest such an inquiry.

"It has also been contended on behalf of the United States that before the signing of the treaty of 1905, the Mexican Government had received the opinion of the American Commissioner in the Chamizal case, which asserted that if the erosion in the Chamizal was not slow and gradual, then *a fortiori* the erosion which had formed the bancos in the lower part of the river could not be slow and gradual.

"The effect of this assertion on the part of the American Commissioner, however, was counteracted by the reply of the Mexican Commissioner, who agreed that there was no similarity between the two cases, and no inconsistency between his

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report on the bancos and his attitude in the Chamizal case. Under these circumstances, it is reasonable to conclude that the Mexican Government adopted the view of their Commissioner, and, in any event, it cannot be successfully contended that in assenting to the language of the preamble to the Banco Treaty, it was precluded from contending that the Chamizal case was of a different nature.

"It has been suggested, and the American Commissioner is of the opinion, that the bed of the Rio Grande as it existed in 1864 before the flood, cannot be located, and moreover that the present Commissioners are not authorized by the Convention of the fifth of December, 1910, to divide the Chamizal tract and attribute a portion thereof to the United States and another portion to Mexico. The presiding Commissioner and the Mexican Commissioner cannot assent to this view and conceive that in dividing the tract in question between the parties according to the evidence as they appreciate it, they are following the precedent laid down by the Supreme Court of the United States in Nebraska v. Iowa above cited. In that case the court found that up to the year 1877 the changes in the Missouri River were due to accretion, and that in that year the river made for itself a new channel. Upon these findings it was held that the boundary between Iowa and Nebraska was a varying line, in so far as affected by the accretion, but that from and after 1877 the boundary was not changed, and remained as it was before the cutting of a new channel. Applying this principle, *mutatis mutandis,* to the present case the Presiding Commissioner and the Mexican Commissioner are of the opinion that the accretions which occurred in the Chamizal tract up to the time of the great flood of 1864 should be awarded to the United States of America, and that inasmuch as the changes which occurred in that year did not constitute slow and gradual erosion within the meaning of the Convention of 1884, the balance of the tract should be awarded to Mexico.

"They also conceive that it is not in their province to relocate that line, inasmuch as the parties have offered no evidence to enable the Commissioners to do so. In the case of Nebraska v. Iowa, the court contented itself with indicating as above stated, the boundary between the two States and in-

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vited the parties to agree to a designation of the boundary upon the principles enunciated in the decision.

"The American Commissioner dissents from the above holding for the reasons given in his subjoined memorandum, and is of opinion that all the changes which have taken place at the Chamizal since 1852 were due to slow and gradual erosion and deposit of alluvium within the meaning of the Convention of 1884.

"He is further of opinion that the Commissioners have no jurisdiction to separate the Chamizal tract, and award a portion to the United States and a portion to Mexico, and in view of his conviction that the river bed in 1864 cannot be ascertained, he considers that the award of the majority of the Commissioners cannot be made effective.

"Wherefore the Presiding Commissioner and the Mexican Commissioner, constituting a majority of the said Commission, hereby award and declare that the international title to the portion of the Chamizal tract lying between the middle of the bed of the Rio Grande, as surveyed by Emory and Salazar in 1852 and the middle of the bed of said river as it existed before the flood of 1864, is in the United States of America, and the international title to the balance of the said Chamizal tract is in the United States of Mexico.

"The American Commissioner dissents from the above award.

"El Paso, Fifteenth June, 1911."

A. LAFLEUR,
ANSON MILLS,
F. B. PUGA. (Rec. 24-27.)

The defendant below also adduced testimony under her plea of the statutes of limitation as to which no question is brought up on this writ of error.

The defendant adduced evidence bearing on her Mexican title, the documents not being in her possession or control, and showed by parol testimony the acquisition of title under Mex-

ico and possession for about fifty years by her husband and those through whom he claimed, though not so continuous as to satisfy the statutes of limitations but bore on proof of title by circumstantial evidence or by prescription.

See testimony of W. J. Warder, R. J. Owen, Virginia Montes, Pablo Telles, Adolfo Cordova, Lorenza Montes. (Rec. 27 to 36.)

The plaintiff below then read in evidence correspondence between the Department of State and the Mexican authorities relative to the boundary treaties, the action of the Commission under them, and as to the conditions under which the State Department would not oppose ejectment suits in the territory in question. (Rec. 54 to 65.)

These agreements all merged in the Treaty of 1910, and were limited by its provisions as to duration to two years after the award of the Commission, which two years closed in 1913, and this suit did not come on for trial until October, 1916. Hence those agreements have no bearing on the case, and could not have been extended by the United States Department of State alone after the treaty provisions, in the Treaty of 1910, expired, and the treaty of 1889, thereafter, controlled the questions involved unless the decision of the Commission was effective. If the refusal of the executive department of the government alone to recognize the self executing award under the treaty of 1910 had any effect it relegated the boundary question to the status under the treaty of 1889 which it had before the treaty of 1910 was made. The status at the time this case was tried was therefore, this: The status quo agreements, if ever of any force on a subject over which the boundary commission under the terms of the treaty of 1889, had exclusive jurisdiction, were merged in the treaty of 1910 and limited in their duration to two years after the award under the treaty of 1910. That period having expired three years before the trial of this case those agreements no longer affect the actions of the courts further than to show that the jurisdiction exercised up to the present channel of the Rio Grande is tentative, and not under a decision made by this government for itself alone in violation of the treaty of 1889 which controlled the matter if it was not concluded by the award under the treaty of 1910. Our State Department acting alone could not rehabilitate those agreements nor could any less authority than the treaty making power do so. Its results from this that the

treaty of 1889 expresses the attitude of this government in policing and enforcing criminal laws on territory which is under arbitration under the treaty of 1889. Such jurisdiction must be regarded as having been exercised without a decision by our government as to the location of the boundary, as each government has engaged in that convention to not undertake to decide such questions of boundary alone for itself but only by amicable agreement to be made under the terms of said treaty.

The Boundary Treaty of 1889 provided among other provisions, as follows:

Art. I. "All differences or questions that may arise on that portion of the frontier between the United States of America and the United States of Mexico where the Rio Grande and the Colorado rivers form the boundary line, whether such differences or questions grow out of alterations or changes in the bed of the aforesaid Rio Grande and that of the aforesaid Colorado River, or of works that may be constructed in said rivers, or of any other cause affecting the boundary line, shall be submitted for examination and decision to an International Boundary Commission, *which shall have exclusive jurisdiction in the case of said differences or questions.*"

Art. VIII. "If both Commissioners shall agree to a decision, their judgment shall be considered binding upon both Governments, unless one of them shall disapprove it within one month, reckoned from the day on which it shall have been pronounced. In the latter case, both Governments shall take cognizance of the matter, and shall decide it amicably, bearing constantly in mind the stipulation of Article XXI of the treaty of Guadalupe Hidalgo of February 2, 1848.

The same shall be the case when the Commissioners shall fail to agree concerning the point which occasions the question, the complaint or the change, in which case each Commissioner shall prepare a report, in writing, which he shall lay before his Government."

The Treaty of Arbitration of 1910 provided, among other provisions, as follows:

"Article I.

"The Chamizal tract in dispute is located at El Paso, Texas, and Ciudad Juarez, Chihuahua, and is bounded westerly and southerly by the middle of the present channel of the Rio Grande, otherwise called Rio Bravo del Norte, easterly by the middle of the abandoned channel of 1901, and northerly by the middle of the channel of the river as surveyed by Emory and Salazar in 1852, and is substantially as shown on a map on a scale of 1-5,000, signed by General Anson Mills, Commissioner on the part of the United States, and Señor Don F. Javier Osorno, Commissioner on the part of Mexico, which accompanies the report of the International Boundary Commission, in Case No. 13, entitled 'Alleged Obstruction in the Mexican End of the El Paso Street Railway Bridge and Backwaters Caused by the Great Bend in the River Below', and on file in the archives of the two Governments."

"Article II.

"The difference as to the International title of the Chamizal tract shall be again referred to the International Boundary Commission, which shall be enlarged by the addition, for the purposes of the consideration and decision of the aforesaid difference only, of a third Commissioner, who shall preside over the deliberations of the Commission. This Commissioner shall be a Canadian jurist and shall be selected by the two Governments by common accord, or, failing such agreement, by the Government of Canada, which shall be requested to designate him. No decision of the Commission shall be perfectly valid unless the Commission shall have been fully constituted by the three members who compose it."

"Article III.

"The Commission shall decide solely and exclusively as to whether the International title to the Chamizal tract is in the United States of America or Mexico. The decision of the Commission, whether rendered unanimously or by majority vote of the Commissioners, shall be final and conclusive upon both Governments, and without appeal. The decision shall be in writing and shall state the reasons upon which it is

based. It shall be rendered within thirty days after the close of the hearings."

"Article VIII.

"If the arbitral award provided for by this Convention shall be favorable to Mexico, it shall be executed within the term of two years, which cannot be extended, and which shall be counted from the date on which the award is rendered. During that time the *status quo* shall be maintained in the Chamizal tract on the terms agreed upon by both Governments."

After the parties had closed their respective cases on the evidence, the defendant below requested of the court a peremptory instruction for defendant, upon the ground that as plaintiff's patents as shown by the stipulation of the parties, did not embrace the land he sued for, he could not recover, he relying on the qualified exercise of jurisdiction to the present location of the Rio Grande to prove that the land in question had become American soil by gradual change of the river, and was therefore accretion to his abutting surveys, without attempting otherwise to prove the accretion.

The defendant below, after his renewed motion for peremptory instruction was refused, without waiving the prior exceptions to refusal of peremptory instructions, requested the court to instruct the jury:

"If the jury should find from the evidence that Pablo Cordova had a regular chain of deeds from and under the Government of Mexico down to him, the jury will not proceed further but return a verdict so stating." This requested instruction was refused and defendant below excepted. (Rec. 67.) The court then charged the jury to return a verdict for plaintiff unless they should find for defendant on her plea of the statutes of limitation, and defendant below excepted to this peremptory part of this charge. (Rec. 67.)

The jury returned a general verdict for plaintiff, and judgment was rendered accordingly.

ARGUMENT.

I.

It is manifest from the whole course of the pleadings and the evidence and the requested charges refused and the exception to the peremptory charge for plaintiff that the sole question of title at issue drew in question a construction of the boundary treaty of 1889 and the arbitration treaty of 1910, and the action of the arbitrators thereunder and the status of the matters involved in the treaty after the award of June 15th, 1911. It was conceded by the plaintiff in error in his pleadings in the court below that but for the qualification and limitations as to the effect of the de facto jurisdiction exercised in the territory in question by the United States the exercise of jurisdiction by this government to the Rio Grande, as it at present runs, would express an unqualified determination and decision by the political department of the government that the International Boundary followed the present channel of the river, which decision would in that case be binding on the courts.

But it was contended by plaintiff in error that the treaties mentioned gave character to the jurisdiction exercised by the United States in that the two governments in said conventions treated the International Boundary as an open question, to be thereafter determined amicably between them. They said substantially to each other that neither would undertake to decide for itself the true location of the boundary, and that the United States, in virtue of the treaty provisions, might police the territory in question pending a decision by the respective governments. These treaties, therefore, so qualified the jurisdiction exercised by the United States that it did not express a decision by this government that the channel of the present river, or any location south or west of the channel of the Rio Grande of 1852, constituted the true boundary. Hence the contentions arose on the treaty.

1—That as the treaties withdrew from the courts of the respective nations the power to decide the boundary question in cases wherein the title to lands would necessarily depend upon the location of the International Boundary, the courts could not decide the titles to lands depending on the boundary until the respective governments should decide the location of the boundary.

2—That if the courts of the United States might, for the purpose of trying titles to land in the territory in question, undertake to decide whether the Rio Grande had receded from its position in 1852 by gradual and slow erosion of the Mexican banks of the river and deposit of alluvium on the American side, the court could not, as it might have done in the absence of the treaty provisions mentioned, presume from the exercise of de facto jurisdiction by this government up to the present channel of the river, that the political department of this government had decided that the change was such as to make the land on the north or east of the river American soil and therefore accretions to the plaintiff's abutting lands. We say the court should not so presume because in so doing it must rest its decision on a presumption of the attitude of the political department of government in the exercise of jurisdiction which the treaties deny it intended to occupy. The courts in the United States take notice of treaties and adjudicate rights accruing under them. If the court might try the case it should therefore try it as an ordinary boundary suit between individuals which would require the plaintiff to prove that he had acquired land by accretion. The treaties precluded him from relying on presumptions arising from actions of the political department of the government which were so qualified by the treaties as not to afford the presumption on which plaintiff below relied.

Thus there was drawn in question on the merits of the case a construction of these two treaties of the United States.

Furthermore, the defendant below relied upon the decision of the Arbitration Commission that the International Boundary was the channel of the river of 1864, which was further south and west than the channel of 1852 but not so far south or west as the present channel of the Rio Grande. This contention necessarily involved a construction of the treaty of 1910 as to the powers of the Commission and as to the effect of their award under the treaty. And this contention is not dispelled by referring to the acts of the executive department in refusing to enforce the award. It was not void on its face, and may be made certain by a survey. If so, the executive alone could not nullify the decision or take its effect from the courts when the award comes in question where private rights are involved.

In Foster and Elam vs. Neilson, 2 Peters, 253, this court said:

"A treaty is in its nature a contract between two nations, not a Legislative Act. It does not generally effect of itself, the object to be accomplished, especially so far as its operation is infraterritorial; but it is carried into execution by the sovereign power of the respective parties to the instrument.

"In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice, as equivalent to an act of the Legislature, whenever it operates of itself without the aid of any Legislative provision. But when the terms of the stipulation import a contrat when either of the parties engages to perform a particular act the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the court."

The cases of Warder vs. Loomis, 197 U. S. 619, and Warder vs. Cotton, 207 U. S. 582, are memorandum decisions which give no statement as to what questions were properly raised in them. We presume they were made in cases wherein the exercise of de facto jurisdiction by this government was not shown to have been limited or qualified as to its purposes, and therefore raised the presumption of accretion or precluded the court from trying the issue, because it must follow the unqualified exercise of jurisdiction by the political department of the government as expressing a decision that the boundary is such as justifies the exercise of jurisdiction, and that therefore land on this side of the boundary is an accretion to abutting surveys.

The Record Sufficiently Shows that there was Drawn in Question as a Material Issue in the Trial the Construc- of Treaties of the United States.

Under Section 238 of the Judicial Code there are no rules of pleading or requirement that the federal question be specially set up or pleaded as was required under some of the statutes. The language of the statute simply is that this court has jurisdiction "in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question."

Whether a construction of a treaty is by appropriate pro-

cedure drawn in question in a trial at law in a district court of the United States or not, must depend on the application to the case of the state procedure and practice in which the court is located.

The following articles of the Revised Statutes of Texas of 1911 will show the practice in Texas in this class of actions:

"All fictitious proceedings in the action of ejectment are abolished, and the method of trying titles to lands, tenements or other property shall be by action of trespass to try title. (Act Feb. 5, 1840, sec. 1; P. D. 5292; see Sayles' Practice, pp. 1016, 1021; Towne's Texas Pleading, pp. 405-434.)

"The trial shall be conducted according to the rules of pleading, practice and evidence in other cases in the district court, and conformably to the principles of trial by ejectment, except as herein otherwise expressly provided.

"The petition shall state:

1. The real names of the plaintiff and defendant and their residence, if known.

2. It shall describe the premises by metes and bounds, or with sufficient certainty to identfy the same, so that from such description possession thereof may be delivered and shall also state the county or counties in which the same are situated.

3. The interest which the plaintiff claims in the premises, whether it be a fee simple or other estate; and, if he claims an undivided interest, he shall state the same and the amount thereof.

4. That he was in possession of the premises or entitled to such possession.

5. That the defendant afterward unlawfully entered upon and dispossessed him of such premises, stating the date, and withholds from him the possession thereof.

6. If rents and profits or damages are claimed, such facts as show the plaintiff to be entitled thereto and the amount thereof.

7. It shall conclude with a prayer for the relief sought. Arts. 7731-2-3.

"The defendant in such action may file only the plea of 'not guilty', which shall state in substance that he is not guilty of the injury complained of in the petition filed by the plaintiff against him, except that if he claims an allowance for improvements he shall state the facts entitling him to the same as providing in the succeeding chapter. Art. 7739.

"Under such plea of 'not guilty', the defendant may give in evidence any lawful defense to the action except the defense of limitation which shall be specially pleaded." Art. 7740.

The plaintiff's petition was in the statutory form, and his pleading was general without special pleading of his title and the defendant pleaded specially to the jurisdiction of the court the facts on which she also relied on the merits. She also pleaded the general issue "not guilty" under which any defense might be made on the evidence. It is to this pleading and evidence, and the special pleading by plaintiff below of the non-effect of the award under the treaty of 1910, and the charges of the court given and refused and exceptions thereto, which must be looked to in order to determine whether or not there was drawn in question in the trial the construction of treaties of the United States. The treaties themselves would not of course be read in evidence as the judicial knowledge of the court was to be relied upon as to their terms.

The plaintiff below, as is shown in the preceding statement, pleaded such effect or construction of the Chamizal Arbitration Treaty and the award thereunder as he contended should be applied. The court below, either treating the plea to the jurisdiction as good pleading on the merits, if not tenable on jurisdiction or on the special pleading of plaintiff below or on the general issue or on all these pleadings, heard evidence as to the treaties and the award thereunder.

The defendant below read in evidence the conclusion, though not all of the opinion, of the Arbitration Commission, and thereby asserted such construction of the treaty under which it was rendered as would give it effect. The plaintiff below read in evidence the minority dissenting opinion (Rec. 39-41), and thereby presented such contention as to the construction of the treaty under which it was written as would support his

contention, as shown by his pleading. Plaintiff also put in evidence a number of state department letters, bearing more or less on the construction of the treaties. (Rec. 54-65.) The defendant below requested, at the conclusion of the evidence, an instructed verdict for defendant upon the ground that plaintiff had not proved that his title covered the land and this was conceded in the stipulation set out, and it was manifest that plaintiff relied on the court's presuming that the land involved was accretion to his land because in no other way, if the court ignored the treaties, could the court account for the International Boundary being located so as to bring this property within the territorial jurisdiction of the court, and both propositions rested upon the assumption that the exercise of de facto jurisdiction up to the present channel of the Rio Grande expressed an unqualified assertion that the boundary was there, whereas the treaties refuted any such unqualified claim or assertion as to the boundary, and showed that the exercise of jurisdiction was by agreement of the respective governments, tentative, and for a limited time and purposes.

The defendant below requested a special charge that "if the jury shall find from the evidence that Pablo Cardova (shown to have been defendant's husband) had a regular chain of deeds from and under the Government of Mexico down to him, the jury will not proceed further, but return a verdict so stating."

This was raising a question of title from Mexico under parol evidence and long possessions which the evidence justified being given to the jury if defendant's contention under the treaties was correct. Defendant had put in evidence the decision of the Arbitration Commission. There was no evidence or pleading on which plaintiff could recover a part of what he claimed in accordance with the award. The land which lay south or west of the Rio Grande channel of 1852, and north or east of the channel of 1864, was not separately described in plaintiff's pleadings or in the evidence. If he had no title to an undefined part of the land he sued for, he could not recover all he sued for on proof of title to only an undefined part thereof.

The exception of defendant below to the peremptory charge of the court in favor of plaintiff on the title necessarily raised every contention which the evidence admitted under the special pleading or the general issue would support.

Counsel for plaintiff in error raised in his assignments of error all the questions thus arising on the pleading and evidence and requested charges or on the charge given by the court. The petition for writ of error sets up that there was involved the construction of a treaty, and the trial judge granted the petition upon the grounds stated in the petition and assignments of error.

Johnson vs. Geralds, 234 U. S. 422.

McGovern vs. Philadelphia R. R. Co., 235 U. S. 389.

F. G. MORRIS,

Counsel for Plaintiff in Error.

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Supreme Court of the United States

OCTOBER TERM, 1918.

No. 372.

CANDELARIA CORDOVA, PLAINTIFF IN ERROR,

vs.

WALTER B. GRANT, SOLE EXECUTOR OF THE ESTATE OF FRANK B. COTTON, DECEASED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

This is an action of trespass to try title, filed in the trial court, by the Executors of Frank B. Cotton, deceased, residents and citizens of the State of Massachusetts, on the 29th day of August, 1908, against Candelaria Cordova, and a large number of other parties, who were residents and citizens of the State of Texas. (Rec. 73.)

On the 6th day of October, 1916, the court granted the defendant Cordova a severance, and a separate trial was had as to this defendant at the October Term, 1916, of the United States District Court for the Western District of Texas, at El Paso, Texas. After the severance both parties filed amended substitute pleadings. The plaintiff's petition was in the usual Texas statutory form in actions of trespass to try title to real estate. (Rec. 3-8.)

The plaintiff pleaded that he was lawfully seized and possessed by fee simple title of several adjoining tracts of land described by metes and bounds in his petition, and alleged to

be bounded on the south by the Rio Grande river; east by said river or the banks of the old channel of said river; on the west by what is known as Magoffin's Addition to the City of El Paso, Texas; and on the north by what is known as the Texas & Pacific Railway Reservation.

The defendant filed an amended plea to the jurisdiction of the court to try the case, as follows:

"This defendant comes now and pleads to the jurisdiction of the court as she did plead in her former answer with less elaboration, and shows to the court that she claims the right of possession of the lands hereinafter described, which the plaintiff claims is embraced within the chain of title under which plaintiff claims. That the question of title and right of possession involved in the case necessarily involves a trial and decision by this court as to the true location of the International boundary between the United States of America and the Republic of Mexico, that is to say that the plaintiff claims the land involved in this suit under a regular chain of title from the State of Texas to the land in controversy, and this defendant, who is the surviving widow of Pablo Cordova, deceased, who died intestate, claims the right of possession under the title of her sons Adolfo Cordova and Jose Cordova, who are the sole heirs at law of Pablo Cordova, deceased, who owned it as his separate property at the time of his death, and was at the time of his death in possession of the land hereinafter described, and of which this defendant, in the right and by the permission and consent of her said sons, together with them, has ever since been possessed under a regular chain of title under the duly constituted authorities for the transmission of such title under the Republic of Mexico and the State of Chihuahua therein." (Rec. p. 8.)

Each of the tracts claimed was described by reference to adjoining tracts, naming the original grantee of each tract from the Mexican Government. (Rec. 8-12.) And it was further alleged:

"That all of said land is situated west of the Rio Grande as it was located and established by Messrs. Emory and Salazar, commissioners respectively of the United States of America and the Republic of Mexico, as the boundary established between said government in A. D. 1852 and 1853, and all of said

land was situated in the State of Chihuahua and Republic of Mexico in 1852 and at all times prior thereto and during the existence of Mexico. That since the year 1852, the Rio Grande has established its location many hundreds of yards south or southwest of its position in 1852, and south and southwest of the land in controversy so that the land involved in this suit is now situated north and east of the present Rio Grande channel and the question on which the title claimed under by the plaintiff depends, and on which the record title of defendant's sons and her right of possession depends is whether or not the said river so changed its position as to be considered as remaining at all times the boundary between said two republics, or so changed its location as that the boundary of 1852 or some position between that boundary and the present bed of said river and south of the lands, or south of some of the lands, involved in this suit, is the present boundary between the United States of America and the Republic of Mexico. That if it should be decided that the land in dispute is not within the United States of America, then the plaintiff is without title, even if he owns all such title as the patents under which he claims passed from the State of Texas (which defendant does not admit but denies), and must fail in the suit whether defendant has title or right of possession, or not; and she being in possession is entitled to remain in possession as between herself and the plaintiff, and if defendant's sons, under whom she holds, have title under the Government of Mexico, their title must protect them. And this defendant shows to the court that while in the absence of treaties vesting the jurisdiction to determine such boundary question in specially designated authorities, this court might try this case and determine said boundary question as it had been determined by the political or executive departments of this Government, if such political and executive departments had determined and decided such boundary question, yet this defendant shows to the court that while the United States Government exercises at present a de facto jurisdiction over the territory where the land involved in this suit is located, that it does not exercise said jurisdiction under claim that said boundary exists at the present bed of the Rio Grande but expressly with the admission in its treaties and departmental correspondence with the authorities of Mexico, that said boundary is unsettled and undetermined in such manner as to present an open question for decision by the respective political or execu-

tive departments of said governments so that the ordinary probative force, or conclusiveness on the courts of the exercise of a de facto jurisdiction does not obtain in this instance. And furthermore, this defendant shows to the court that the treaties and acts of the respective governments placing said boundary disputes within the jurisdiction of certain special authorities, of which this court must take judicial notice, must necessarily have deprived the courts of each of said republics of jurisdiction to decide litigation between private claimants with respect of land situated within the disputed area, wherein it is necessary to decide as to the true location of the boundary between said governments in order to determine the question of title involved.

"Wherefore, this defendant prays that this court refuse to exercise jurisdiction to try this cause, and that this court either dismiss this cause for want of jurisdiction or enter an order staying a trial of this cause until the said boundary between said governments shall be established." (Rec. 11-12.)

The defendant also pleaded the general issue "not guilty" and the Texas statute of limitations of ten years as his defense if his plea to the jurisdiction should be overruled, without waiving exception to the ruling on the plea to the jurisdiction, this being according to Texas practice which requires all pleas and defenses to be filed together but in due order of pleading. (Rec. 12-13.)

The plaintiff filed a general exception or demurrer to the sufficiency of defendant's plea to the jurisdiction of the court. (Rec. 13.)

The court sustained the plaintiff's exception (Rec. 16) and declined to hear proof of the allegations of the plea to the jurisdiction; to which ruling defendant excepted, and this ruling presents the first question to be decided. (Bill of Exec. Rec. 20.)

The trial on the merits proceeded before the court and jury and the plaintiff read in evidence regular chains of title to the N. W. Burdett surveys of land to which patents had been issued by the State of Texas, and the following stipulation of counsel:

"It is agreed that the plaintiff shall offer in evidence without objection the patents to the N. W. Burdett Survey Number

One, N. W. Burdett Survey No. Two and the Merchant and Thomas Survey, duly filed in this cause, and that by the terms of said patents and each of them from the State of Texas and all of the mesne conveyances, including the conveyances to the plaintiff, the Rio Grande river is called for as the southern boundary of said surveys and each of them; and that plaintiff has title to the Burdette Surveys Nos. 1 and 2 under said patents and the mesne conveyances, and to all land, if any, which law under the facts belongs to said surveys or either of them by accretion, defendant not admitting there is any accretion thereto; and that the land described in plaintiff's petition lies between the said east line of Survey No. 1 and the west line of Burdett Survey No. 2, and the northern boundary of said Surveys Nos. 1 and 2 and the present channel of the Rio Grande.

"And it is further agreed that the defendant, Candelaria V. de Cordova, now has possession of a part of the land described in plaintiff's petition, and that all of the land of which the defendant, Candelaria V. de Cordova, has possession, which is described in plaintiff's petition, lies between the present channel of the Rio Grande river, and the channel of the said Rio Grande river as it existed in 1852, and that such portion of said land as defendant has possession of lies between the northern boundary of said N. W. Burdett Survey No. 2, and the present channel of the Rio Grande river.

"That the United States, the State of Texas, County of El Paso and City of El Paso are now and for many years past have been, and at the time of the institution of this suit and long prior thereto, were, and ever since said time have been exercising and still are exercising government control and political jurisdiction over all of the property described in plaintiff's petition; and that the United States of America and the State of Texas have enforced their laws during said time upon all of said land, and have punished and still punish offenders for violations of said laws."

The plaintiff rested, and the defendant thereupon moved the court to instruct the jury to return a verdict for the defendant upon the ground that the field notes of neither of the surveys patented to N. W. Burdett were proved to embrace the land sued for and described in plaintiff's petition, which motion was

by the court refused, and the defendant then and there excepted to such refusal to give such peremptory instruction. (Rec. 23-24.)

As the plaintiff offered no evidence to prove that the land occupied and claimed by defendant was situated within the exterior boundaries of the title under which plaintiff claimed, and as the stipulation read in evidence together with the dates of the patents under which he claims showed that the land in controversy was not included within plaintiff's title as originally granted by the State said land then being in Mexico, the ruling of the court must have rested on plaintiff's contention that the land in controversy was an accretion to the surveys which he owned. This contention plaintiff would support by resting a presumption upon a presumption. This induced the trial court to presume that the land in controversy is within the State of Texas because the political departments of the Government of the United States have exercised jurisdiction over this land as United States territory, and that if it is within the State of Texas this must have come about by accretion to American soil, as they concede it was in Mexico in 1852.

The contention of defendant was and is: 1. That if the court was bound in the absence of any law or treaty limiting the effect on the court of the action of the political and executive departments of government in exercising jurisdiction to the present location of the Rio Grande to treat that river as now located as the boundary between the United States and Mexico, yet as in the case at bar the treaty between the United States and Mexico, and the actions of the executive department, plainly show that the de facto jurisdiction is exercised tentatively and with full recognition that the location of the boundary is an open question to be settled by arbitration or otherwise amicably, the exercise of de facto jurisdiction by the United States under such limitations does not, as plaintiff in error contends, operate to determine titles until the question of boundary shall itself be settled, or at least until the United States government shall decide for itself that the land in question is a part of the territory of the United States. Until the two governments shall settle the location of the boundary, or the United States shall cease to treat as an open question the location of the boundary, the Judicial department may not give greater probative force to the tentative qualified exercise of jurisdiction over this territory for the purpose of deciding the ownership of land, than

the political and executive departments are giving to their acts in thus exercising a de facto jurisdiction under express agreement with Mexico.

Plaintiffs seek to avoid this dilemma by reference to the agreement of the state department that the courts might try cases wherein the occupants did not prove to an agent of the department and of the foreign minister of Mexico that they had a prima facie record title from Mexico. But this would not establish a rule of evidence to govern the trial. At least the plaintiff having the burden of proving a title in himself must show the accretion, and the mere permission to sue, if that was of any consequence, did not take the boundary question out of arbitration and make of the exercise of jurisdiction by this government such unqualified and unconditional assertion of jurisdiction de jure as would bind the courts to presume that the river had changed its location by slow erosion of the Mexican banks and gradual deposits of earth on the American side until it reached its present location. This is the very question the executive departments of the respective governments was undertaking to decide.

The court having refused defendant's request for a peremptory instruction in her favor, the defendant proceeded with her testimony in support of her plea of the statutes of limitation, and also adduced evidence under the general issue to show that plaintiff, many years before this suit was filed, had made an addition to the City of El Paso of the land in controversy and divided it into lots, blocks, streets and alleys, and sold lots by reference to the map of said addition, whereby he had dedicated streets and alleys to the public and afterwards had no right of possession (which is essential to sustain the action of trespass to try title) to the streets and alleys, and that as he had not separately described the blocks he was entitled to possess, if he owned the land, so that a judgment could be rendered for him therefor, and was not entitled to recover possession of the streets and alleys, he must fail in the action.

The plaintiff adduced evidence on limitation and as to the dedication issue, and the evidence being closed, the defendant moved the court to instruct a verdict for the defendant upon the grounds of the former motion for a peremptory instruction, to-wit: Because there was no evidence adduced tending to prove that the land in controversy is included within the exterior boundaries of the title or patents under which plaintiff

claims, wherefore plaintiff must fail for want of proof of title in himself, and upon the evidence adduced to show a dedication by plaintiff of a part of the land sued for to purposes of streets and alleys, whereby he lost the right of possession of so much of the land as was included in streets and alleys, and because the lots and blocks remaining unsold are not so identified by pleadings or evidence as to admit of a recovery of such of them as he had not sold.

The court refused this request for peremptory instruction, and defendant excepted, and the court instructed the jury to return a verdict for the plaintiff unless they should find for the defendant on her plea of the statutes of limitation, to which peremptory charge for plaintiff as to title other than by limitation the defendant excepted. The bill of exceptions brings up for review these several rulings of the court on the instructions, refused and given.

In addition to the facts proved on the trial, those of which the court takes judicial notice must be stated.

It is judically known to this court that the boundary between the United States and the Republic of Mexico was established at the middle of the channel of the Rio Grande as it ran in the year 1852, under the Gadsen Treaty of 1853, by Commissioner Emory for the United States and Salazar for the Republic of Mexico. It is conceded in this record that the land involved in this litigation is situated on the Mexican side of the line of the Rio Grande of 1852. (Rec. 23, 24, 29.)

The treaty of 1884 established rules for settling boundary disputes arising from changes of position of the Rio Grande from time to time, to the effect that alterations in the location of the river arising from "natural causes through slow and gradual erosion and deposit of alluvium and not by abandonment of an existing river bed and the opening of a new one" should not divide the boundary line from the center of the normal channel, Art. I. Art. II presented substantially the converse of Article I. And Article V declared that "rights of property in respect of lands which may have become separated through the creation of new channels as defined in Article II hereof, shall not be affected thereby, but such lands shall continue to be under the jurisdiction of the country to which they previously belonged."

A treaty signed in 1889, but not ratified and proclaimed until December 26, 1890, provided for the creation of an "Interna-

tional Boundary Commission." This treaty provided that all differences or questions that might arise as to boundary from changes in the course of the Rio Grande, etc., "shall be submitted for examination and decision to an International Boundary Commission *which shall have exclusive jurisdiction in the case of said differences or questions.*" Art. I.

Article IV provided for summary determination of boundary questions as they arose upon notice by local authorities of changes in the course of the river. Their decisions were made binding upon their respective governments unless the Commissioner of one of the governments should disapprove of the decision within one month from its pronouncement. In case of disagreement, each commissioner was required to report the disagreement to his government, and the respective governments should then take up the question and decide it amicably. Art. VIII. This treaty, which was limited to four years' duration, was extended from time to time until an indefinite extension was given it December 24, 1900.

The proceedings of the Commissioners in what is known as "Chamizal Case No. 4" (the name having reference not to any particular title but to a district which included the land in controversy in this suit) resulted in a disagreement between the Commissioners, and they, after long efforts to agree, reported the disagreement each to his government. A long course of diplomatic correspondence ensued, which is reported in the report of "Chamizal Arbitration, Appendix to the case of the United States of America, Vol. 1." During the progress of this correspondence, this suit was instituted in 1908. While it was pending, much correspondence ensued over efforts of Texas courts to eject persons occupying the disputed territory. An agreement between the Department of State and the Mexican Ambassador was entered into prior to the treaty of arbitration of 1910, as to the class of claims against which the courts of the United States might entertain suits of ejectment. This agreement is shown by the letter of Mr. Knox of March 22, 1910, (Chamizal Arbitration Vol. 1, p. 421) and the report by Senor de la Barra, June 9, 1910, of the acceptance by his government of the proposal for preserving the status quo which were read in evidence. (Rec. 55-58.)

This agreement was not submitted to the United States Senate or otherwise passed as a modification or amendment of the boundary treaty of 1900. It provided for the appointment of

an officer to determine what inhabitants had taken possession of the disputed territory under prima facie Mexican title prior to March 15, 1910, and that there should be no interference with proceedings in court to eject those who did not prove before this officer their prima facie Mexican titles and show possession prior to March 15 1910. Afterwards the two governments made a Treaty of Arbitration signed June 24, 1910, but which was not ratified by the Senate and ratifications exchanged until January 25, 1911. In that treaty it was provided that the decision which might be rendered should, if favorable to Mexico, be executed within two years from the date of the award and that "During that time the *status quo* shall be maintained in the Chamizal tract on the terms agreed upon by both Governments." This defendant, at that time not having possession of her title papers was unable to prove up her title before said agent of the State Department.

The decision of the Commission of Arbitration was announced on June 15, 1911, in favor of Mexico for a part of the land in question. This suit did not come on trial until October 2, 1916, when the plea to the jurisdiction of the court was interposed and hence this suit was not affected by the former agreement as to preserving the status quo, which agreement had expired with the expiration of the two years next succeeding the award of the Commission.

The treaty of 1910-1911 provided in Art. III: "The decision of the Commission, whether rendered unanimously or by a majority vote of the Commission, shall be final and conclusive on both governments, and without appeal."

A majority of the Commission decided that all changes in the river from 1852 to 1864 were by slow gradual erosion and deposit of alluvium within the meaning of Art. I of the Convention of 1884, but that the changes which occurred in 1864 came under Article II of the treaty of 1884, and that the part of the Chamizal tract lying between the middle of the channel of 1864 and the present channel of the river, was within the Republic of Mexico. The Commission did not attempt to locate or mark the line on the ground which was occupied by the river up to 1864. The Executive Department of the United States assumed authority to reject the decision but it is questionable as to its authority to do so, as we will presently show. But at all events, the extracts from President Taft's message to Congress quoted in a letter from the State Department, shown in

the record pp. 54 and 55, show that the exercise of de facto jurisdiction over this territory is not under assertion of conclusive right, but subject to negotiations with Mexico with a view to reaching a settlement. In the meantime, the jurisdiction of the United States it is contended by plaintiff in error is exercised alone to preserve law and order and does not extend to the right to decide that the land in controversy is within the United States for the purpose of supporting title to the lands issued in the United States.

It was proved by the defendant on the trial that she had possession of title papers of some kind which described the land she claimed in her pleadings and that from the apparent Mexican grants of small tracts Mr. Owen, a civil engineer, was able to place her land on a map which he was making. The witness Warder testified as to these papers, which he obtained from defendant's husband, now deceased, but he was unable to state their nature further than that they described the land so it could be surveyed and mapped. He delivered these title papers to one Brewster Cameron who lived in New York, and later was drowned being carried over Niagara Falls. (Rec. 27-28.)

R. J. Owen, civil engineer, testified to using the papers Warder obtained from Cordova, in making the map. He said: "The names on the map are the names that were embodied in the papers given us, the ones from the Mexican Government, not the ones from individuals." (Rec. 29.) These lands thus mapped were on the Mexican side of the river of 1852. (Rec. 29.)

The defendant not having the title papers proved by parol the title and possession under which she and those under whom her late husband, Pablo Cordova, claimed, for a period of 50 years as to some of the tracts including where she lived at the time of the trial. (See testimony of Virginia Montez, Rec. 31-33; and Pablo Telles, Rec. 35-36.)

The plaintiff did not adduce any evidence tending to prove how the Rio Grande changed its position from that occupied in 1852. The stipulation previously quoted shows the land in controversy was on the Mexican side of the river in 1852. And while this stipulation states that the field notes of plaintiff's patents call for the Rio Grande, yet this stipulation must be understood to have reference to the river as it ran at the date the patents relied upon (1858), or rather to the date of the state recited in them under which they were issued, which was

1854. There being no evidence of any change of the channel of the river from 1852 until 1854 or 1858, the presumption is that it continued in the position it occupied in 1852 until after the patents issued. As to the later patent issued to Merchant and Thomas in 1894, there was no evidence adduced to show that plaintiff acquired from them the title, if any, that passed by that patent, nor does the stipulation as to title cover title from Merchant and Thomas. If that patent had any effect, the plaintiff proved an outstanding title against himself, and showed that the State of Texas did not treat the land in controversy as accretion to the Burdette titles under which plaintiff proved that he had such title as passed by the Burdette patents, if any.

The defendant's assignment of error filed with the application for writ of error are as follows:

ASSIGNMENTS OF ERRORS.

I.

"That the said United States District Court erred in sustaining the demurrer and exceptions of the plaintiff to the plea by the defendant to the jurisdiction of said court to try the title to the land involved in this suit, in that it was alleged in said plea that said land was situated south and southwest of the location of the Rio Grande during the year 1864, and prior to the great flood in said river of that year, and that the Boundary Commission constituted under the treaty of 1910 between the United States of America and the Republic of Mexico had decided on June 15, 1911, that the channel in which said river ran during the part of the year 1864 prior to the great flood of said year, was the boundary between said governments, which decision became operative by the terms of said treaty at the end of two years from the date of said decision, wherefore the said District Court had no jurisdiction to try said suit and determine either the title or right of possession of said land as between the plaintiff and defendant.

II.

"That said court, in any event, erred in sustaining said demurrer and exceptions to the defendant's said plea to the jurisdiction, in that if said decision was not effective to determine the boundary between said governments that nevertheless said plea showed to the court, and the court judicially knew that if the decision was not effective that the question of determining said boundary was pending before the respective political and executive departments of government, and was thereby withdrawn from the courts in all cases wherein a party defendant in court might allege and prove that he or she held under a Mexican title the land involved in the suit; the court in the event that the defendant had not proved her title before the appointee Kiblinger, who was charged to ascertain as to said Mexican titles being authorized to proceed no further than to ascertain whether or not defendant had title under the government of Mexico, which would support her claim of title if said land was yet within the territory of the sovereign which issued her title when said land was under said sovereignty.

III.

"That said court erred in refusing at the close by plaintiff of his case, to instruct a verdict for the defendant, in that it appeared from the date of the patent under which plaintiff claimed the land in controversy (which patent was issued by direction of a Statute of 1854) that the Rio Grande called for by the field notes of said patent was the said river as it ran in 1852-3 and it appeared from the stipulation of the parties read in evidence by the plaintiff that the land sued for by plaintiff and claimed by the defendant is situated south and southwest of the channel of said river as it ran in 1852 and 1853, and the plaintiff failed to adduce any evidence tending to show that any land south or southwest of said river channel of 1852-3, had become a part of his survey by slow erosion of the western bank and accretion to the eastern or northern banks of said river, and because, in view of said treaty and declarations of the political and executive departments of the government, the question as to whether the change in said river's channel occurred by slow erosion on the one side and accretion on the other, or by rapid erosion of the western or southern bank of said river, was an open question which had

not been decided by either government for itself, and was subject to arbitrament between said governments, and remained an open question at this time for determination, the court could not judically know more than the executive branches of the government had decided, and presume from the status really occupied by the executive department, that such change in the river channel was by slow erosion on the one side and slow accretion to the other side of the former channel of said river, and thus decide that the land in controversy was in the United States of America and became a part of plaintiff's land, when the two governments held the boundary between them as undetermined and expressly stipulated for a limited tentative exercise of *de facto* jurisdiction by the United States, which precluded the court from deciding for the purpose of adjudicating title to land the boundary question which the governments had not determined between themselves, and which neither assumed to determine for itself without agreement with the other; and hence, if said court might try the title to said land before the government had determined the boundary, it must hear and rest on evidence as to whether or not there was accretion to plaintiff's land of that formerly owned by the defendant.

IV.

"The court erred in refusing the motion of defendant for an instructed verdict for defendant at the conclusion of the evidence adduced by the plaintiff, and the defendant, in that it appeared from the testimony adduced by plaintiff, as well as that adduced by defendant, and without dispute or controversy as to the facts, that the land sued for by plaintiff and described in his petition only by its exterior boundaries, had been formed into an addition to the City of El Paso, during or prior to the year 1882, when it was divided into lots and blocks and streets and alleys were dedicated to the public so that the plaintiff had no possession of said streets when this defendant took possession of said land and was not ousted therefrom by this defendant, nor had plaintiff when said suit was instituted, or since then, any right of possession of said streets, and the plaintiff not having described or sued for lots or blocks in said addition, but having sought a recovery of the entire ground embraced in the field notes set out in his

petition, including streets and alleys, the plaintiff was not entitled in an action of trespass to try title provided for by the Statutes of Texas to recover possession of the streets and alleys in said addition, and not having sued for lots or blocks by such description as would enable him to obtain a judgment for lots and blocks, he must fail in his action.

V.

"The said court erred in refusing to submit to the jury the question as to the existence and authenticity of the Mexican title claimed under by defendant, as requested by the defendant, the defendant being unable to produce in court said title, but having aduced sufficient evidence of its existence and authenticity to suport a finding by the jury in her favor on that issue."

I.

This court has jurisdiction of this writ of error on the grounds that the jurisdiction of the trial court is a question presented for decision, and further because there is involved, in the decision below, a question arising under treaties of the United States involving their construction and application. The defendant in error alleged the value of the land in controversy to be more than two hundred thousand dollars ($200,000) and the annual rental value of the land to be twenty thousand dollars ($20,000).

Johnson vs. Geralds, 234 U. S. 422.
McGovern vs. Philadelphia & R. R. Co., 235 U. S. 389.

II.

A dispute between nations as to an International boundary line, which has been submitted to arbitration, is not justiciable in the courts of either country pending the arbitration, and when the title of litigants cannot be adjudicated without judicially determining the International boundary, which neither government has undertaken to decide for itself, the issue is not justiciable in the courts of either country; and

this is especially true where, as in this case, the nations concerned have expressly committed these boundary questions to the exclusive jurisdiction of a boundary commission or to their direct adjustment through diplomatic channels in cases of disagreement between the commissioners.

Foster and Elam vs. Neilson, 2 Peters, 253.

III.

The agreement between the State Department of the United States and the Ambassador of Mexico for the trial of title of claimants to lands in the questioned territory, when necessarily the title of a plaintiff claiming alone under an American title must lead to a decision that the land is American soil or that it is not, is invalid, as it raises an issue that was not justiciable in a court of the United States pending arbitration and jurisdiction to try such an issue could not be conferred on the United States courts by the Secretary of State and a Mexican ambassador when jurisdiction was withdrawn from the courts by treaty.

IV.

Whatever effect the agreement made a part of the Arbitration Treaty of 1910-1911 to maintain the *status quo* for two years from the award of the commission may have had while it was in force, such agreement expired with the expiration of two years from the date of such award, June 15, 1911. That treaty by express provisions preserved the *status quo* agreement only for two years from the date of the award by the Arbitration Boundary Commission, and this plea to the jurisdiction was filed and tried after the expiration of said two years.

V.

The decision of the commission that the line of the channel of the Rio Grande as it ran up to the beginning of the year 1864, was the International Boundary, was a valid award and self executing, and established the International boundary, and it was not within the power of the Executive Department of this Government alone to place the United States

Government in the attitude of denying its validity. Only an act of Congress could place this Government in that attitude; and as this court is required by Article VI, sub-division 2 of the Constitution of the United States to regard treaties as a part of the supreme law of the land, which the court is to take notice of and administer when applicable in judicial controversies, it is for this court to decide, when private rights are involved, whether an arbitration award is self executing and valid in the absence of any authoritative denial by this Government of the validity of such award. Foster and Elam vs. Neilson, 2 Peters, 253. In that case this court said:

"A treaty is in its nature a contract between two nations, not a Legislative Act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

"In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act—the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the court."

There was not after the expiration of two years from the date of the award any valid authoritative act of this Government denying the effectiveness of said decision, or claiming any rightful jurisdiction over so much of the disputed district as lies south or westerly of the channel of the Rio Grande as it ran in 1864. The act of the President alone was not sufficient. The policing of said territory for the protection of life and property of the inhabitants was not authorized by any act of Congress, and was continued, it must be assumed, merely for those limited purposes, and cannot lawfully be attributed to a purpose of this Government to disregard its treaty obligations to abide the award of the commission, unless it is upon its face so incomplete and uncertain as to its meaning that it cannot be given effect.

The assumption that it is void for uncertainty because the line of the channel of the Rio Grande of 1864 is not described in the award by field notes does not justify the assumption that it may not be made certain by a survey based upon reliable existing data. There was no effort made to show in this case that the award was void for uncertainty; and this court, it is believed, will not be justified in holding without evidence that it was void for uncertainty. In the language of boundary law, that is certain which is capable of being made certain; and it may not be assumed that a call for a natural object, or the former position of a natural object, that has changed its location, cannot be identified on the ground. *Prima facie* the call for such an object is a good call, and it must be treated as such until it is shown that it cannot be located.

As the plaintiff shows in his petition that he sues for all the land lying between the position of the Rio Grande in 1852 and its present position, and as the award of the Commission establishes the International boundary at the line of the Rio Grande of 1864, and shows that this award establishes the fact that some at least of the land sued for by plaintiff is at present in Mexico, and as he does not so describe that which, if any, he might recover under the award so as to identify it, he must fail.

VI.

If the award of the arbitrators was invalid or not self executing, then the treaty under which it was made has expired, and the agreement therein made to allow ejectment suits in United States courts under certain circumstances, by its express provisions expired two years after the award was made, which two years elapsed before the plea to the jurisdiction of the court was filed in this case. The boundary question, therefore, reverted to its condition under the Boundry Treaty of arbitration of 1889-1890, which was extended indefinitely. The matter is still under arbitration or is being dealt with directly by the respective governments under the treaty of 1890, as an open undecided question, and its status does not make the issue so far justiciable in the courts of either country as to admit of the courts undertaking to decide each for

itself, in passing on titles emanating from its government, that the boundary was such as to sustain the title issued by the government whose court should thus undertake to decide the issue.

The courts of the United States may not disregard this special status created by treaty, as to the boundary in question, and assume for the purpose of deciding a title to land, what this government does not assume, but treats as an open question to be determined as si provided by its treaty with Mexico.

The distinction attempted to be drawn by the so-called *status quo* agreement (which was not a *status quo* agreement at all but was an agreement to permit the disturbance of the *status quo*) is wholly untenable. That agreement sought to permit a plaintiff to sue and recover without proving title, or it permitted the court to decide that the land involved in the boundary question was accretion to lands in Texas, and was in Texas, when that question was the very question over which the governments had by treaty conferred exclusive jurisdiction elsewhere. It was also untenable as it would delegate to a department agent the power to try the *prima facie* character of Mexican titles without the power to summon witnesses or to compel the production of documents, and, possibly without the legal learning to know a Mexican title when he saw it, and would make his decision sufficient to authorize a court in Texas to award the land occupied and peaceably possessed for half a century possibly to a Texas claimant who was without title or right of possession if the land was in Mexico, or to decide that it was not Mexican soil and thus to anticipate one of the most important rights which the Mexican Government could have in view in having the International Boundary Commission or the respective governments acting together to decide as to the boundary. A like result has come in this case out of the rule applied by the trial court when it applied the ordinary rule in cases of decisions by governments for themselves as to the location of their boundaries. In such cases, of course, the courts follow the decisions of the political department of the government. But when the political department has made no decision, but regards the question of boundary as open to inquiry and proof as to the location of the boundaries, and has provided by treaty for settlement of such questions, as an open ques-

tion through a boundary commission of arbitration, then for the court to invest the status thus occupied with that of a closed determination by the political department of government is to impeach the good faith of our government in its undertaking to have tried out upon evidence before an arbitration tribunal, the true location of the boundary. We would thus reap a large part of the fruits of a favorable decision by the arbitration commission by deciding for ourselves through the courts in the trial of title to the lands involved, the very question we are pretending to try to adjust amicably with Mexico under a treaty with her, with the understanding that we are not to decide it for ourselves, and by ourselves, but only in conjunction with the Mexican Government under the terms of the treaty entered into for the settlement of the question.

We respectfully submit that the plea to the jurisdiction was well taken and that the court below erred in sustaining an exception or demurrer to it.

VII.

If the court had jurisdiction to try the case, the court erred in refusing the defendant's motion for a peremptory instruction, because the plaintiff must recover on the strength of his own title; and confessedly he had no title to the land he sued for unless it was accretion to the patented land, and the *de facto* jurisdiction exercised to maintain law and order in the territory claimed by Mexico, being qualified and tentative only since the treaty of 1890, and the appointment and action of the Boundary Commission under the Treaty of 1890, was of no such probative force on the question of accretion as to support the plaintiff's title by accretion; and plaintiff not having adduced any evidence of accretion, was not entitled to recover.

The court in trying the case should have ignored the International boundary question as outside of its jurisdiction and should have tried the cases as one of boundary between individuals. The plaintiff should have been held to prove by evidence that the land in controversy which confessedly was on the other side of the Rio Grande when his patents to Burdett were issued, had become a part of his surveys by accretion under the doctrines of law governing such cases. He

was bound to recover on the strength of his own title even as against one in peaceable possession without title.

Defendant proved by the witneses, Warder and Owen, that she had apparent Mexican titles in her possession issued to those under whom her pleading shows that she claimed, containing such descriptions of the land as enabled the engineer Owen to plat the lands on a map, and that Warder obtained them and sent them out of the state. (Rec. 27-31.). Defendant proved by the witness, Virginia Montez, Oracio Otero, Jose Cordova, Adolfo Cordova, Pablo Telles and Lorenzo Montez (Rec. 31-36) that those under whom she held purchased the lands from sundry persons and possessed the land as shown by the older witness, for about 50 years. This testimony, if submitted to the jury, would have justified them in finding that those under whom she claims had a regular chain of title from the Mexican Government, notwithstanding it was not such continuous possession as was required to support her plea of limitation.

In any event her prior possession was sufficient *prima facie* evidence of title, not only to put plaintiff on proof of his title, but would have authorized a recovery by her against plaintiff if she had sued, unless plaintiff had shown a superior title. House vs. Rivas, 89 Tex. 626.

That she had Mexican title to the land was also proved by circumstancial evidence under rules laid down in Texas decisions.

McMahon vs. McDonald, 113 S. W., 322.
Kirby vs. Hayden, 125 S. W., 993.
Pratt vs. Townsend, 125 S. W., 114.
Ardoin vs. Cobb, 136 S. W., 273.
Hutcheson vs. Storre, 48 S. W., 783.
Teagarden vs. Patton, 107 S. W., 910.

VIII.

The platting into lots, blocks, streets and alleys of the land included in the boundaries, set out in plaintiff's petition, and the sale of lots by reference thereto, amounted to a dedication of the streets and alleys without recording said map, which was irrevocable by plaintiff.

State vs. Travis Co., 85 Tex., 440.
Menczer vs. Poague, 118 S. W., 865.
City of Kaufman vs. French, 171 S. W., 831.
City of Corsicana vs. Zorn, 78 S. W., 928.
Wolf vs. Brass, 72 Tex., 134.

The plaintiff in an action of trespass to try title in Texas must not only have title but a right to enter into possession. If he has a right by reason of his interest in the use of the streets to enjoin others from enclosing them, but has no right to occupy them himself, he cannot recover in this action, for it looks not only to dispossessing a defendant but to the placing of plaintiff in actual possession.

Hays vs. T. & P. Ry. Co., 62 Tex., 397.

The plaintiff not having so described the blocks she owned after sales as to be able to recover them, and not being entitled to recover and possess himself of the streets and alleys, should not have recovered.

The dedication by sale of lots referring to a map of an addition to El Paso was proved by the witness, Patterson, on cross-examination (Rec. 53) and by deeds as shown at pages 65 and 66 of the record. This dedication could not have been revoked by plaintiff without re-acquiring the lots he sold.

The court upon request refused to instruct a verdict for defendant on these grounds and instructed a verdict for plaintiff unless the jury should find for defendant on her plea of limitation, to which defendant excepted. (Rec. 66.)

Pliantiff in eror prays that the judgment of the court below be reversed and that the cause be remanded with instructions to dismiss this cause for want of jurisdiction, or if such order be denied, that the cause be reversed and remanded for a new trial thereof.

FRANK G. MORRIS,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

October Term, 1918.

No. 104.

CANDELARIA CORDOVA,
PLAINTIFF IN ERROR,
v.
WALTER B. GRANT, EXECUTOR ESTATE OF FRANK B. COTTON, DECEASED,
DEFENDANT IN ERROR.

Brief of Defendant in Error.

Reference is made to the statement of the case in the brief of the defendant in error upon the motion to dismiss the writ of error for want of jurisdiction (Brief, pp. 3-9, incl.). A statement of a few additional facts may be useful to the court.

The action was brought against the defendant (plaintiff in error) and 107 other trespassers in an action in trespass to try title. A large part of the land described in the petition is located south of the boundary line between the United States and Mexico as established in 1852, being the then center of the Rio Grande River, and of such described land the defendant (plaintiff in error) claimed title to some forty acres (Tr. p. 34) by virtue of an alleged chain of title down from the Republic of Mexico and State of Chihuahua, and also by an alleged adverse peaceable and continuous possession for more than ten years (Ans.

Tr. pp. 8-13). The plaintiff (defendant in error) proved his title by deeds running from the State of Texas (Tr. pp. 21-23), and by later deeds showing successive transfers down to the deed to Frank B. Cotton, dated January 12, 1881 (Tr. p. 39). There was a map used before the jury (not a part of the record, but referred to in the testimony, Tr. p. 49) which showed that survey No. 2 of Cotton Addition reached from a point at the north of the city down to the river, a distance of 2 miles or so, that the reservation of the Texas & Pacific Railroad cut it in two, and that the land referred to in the plaintiff's (defendant in error's) original petition comprised all of the land south of said reservation (Tr. p. 5). The survey of 1852 showed the distance from the northern end of the survey to the river as 3008 *varas* (Tr. p. 21); the deed to Frank B. Cotton, in January, 1881, showed the same measurement from north to south as 4680 *varas* (Tr. p. 39); a *vara* is 33.33 inches; between 1852 and 1881 the river, therefore, had receded south over five sixths of a mile, and the acreage of survey No. 2 had increased in the same time from 320 acres to 520½ acres; by all the mesne conveyances the Rio Grande River is called for as the southern boundary of said surveys and each of them (Tr. p. 23). The parcel of land which the defendant (plaintiff in error) claimed, as shown by the map used, is situated about half way between the Texas & Pacific reservation and the river.

The premises described in the suit constitute part of the Chamizal Tract, so called, "which has been the subject of negotiation between the two governments ever since the failure of the Joint Commission, in 1897, to settle the boundary at this point" (Tr. p.

55). In the year 1907 it was proposed that the two governments, Mexico and the United States, terminate the dispute by arbitration (Tr. p. 55), and this was attempted by the treaty of June 24, 1910, which enlarged the International Boundary Commission by the addition of a Canadian jurist, and the Commission was empowered to decide *solely* and *exclusively* as to whether the international title to the Chamizal Tract was in the United States or in Mexico. For copy of treaty see brief of plaintiff in error, p. 15. The Commission thus enlarged, by votes of the Presiding and the Mexican Commissioners, on the principle of rapid erosion as against slow erosion, decided that the Chamizal Tract *should be divided* between the two countries at a point wherever the bed of the Rio Grande River existed in 1864, leaving to the two countries to try later to locate where that line might be (Tr. pp. 24-27). The American Commissioner dissented upon the ground that the Commission was without jurisdiction to divide the Tract, and because the finding was vague, indeterminate, and uncertain in its terms and impossible of execution (Tr. pp. 40, 41).

The United States did not accept the majority award as valid or binding, and held that the Commission had "failed to accomplish the object which the High Contracting Parties had in view, namely, 'to terminate the differences which have arisen, as to the international title to the Chamizal tract,' inasmuch as it makes no attempt to locate the boundary line at the tract in dispute, and its effect is to remit once more this all-important matter to the two parties for settlement" (Tr. p. 54). The position of the United

States is shown in the language of the annual message of the President to Congress in December, 1911, and December, 1912 (Tr. p. 55). The matter was still pending for decision between the two governments at the time of the trial of the case (Tr. p. 54).

It was stipulated at the trial (Tr. p. 24) that the United States, the State of Texas, County and City of El Paso, are now and for many years past have been exercising, and still are exercising, governmental control and political jurisdiction over all the property described in the plaintiff's (defendant in error's) petition; and enforce their laws thereon and punish offenders.

Argument.

The first assignment of error (Tr. p. 68) was that the District Court erred (Tr. p. 16) in sustaining the exceptions of the plaintiff (defendant in error) (Tr. pp. 13-15) to the plea by the defendant (plaintiff in error) (Tr. pp. 8-13) to try the title to the land involved in this suit, because it was alleged by the defendant (plaintiff in error) that the land lay south of where the line of the river would have been in 1864, and hence south of the boundary line of the United States referred to in the finding, or award, of the majority of the Commissioners under the treaty of June 24, 1910. This question has been argued in the brief of the defendant in error on his motion to dismiss the writ of error, and reference is made to that brief (pp. 12-15). As set forth in the statement herein, the executive department of the government of the United States and that of Mexico are negotiating as to the boundary between the two countries at

that point. The United States and Texas are exercising *de facto* sovereignty over the land (Tr. p. 24), it being a part of the City of El Paso. The defendant (plaintiff in error) in her answer (Tr. p. 12) admits that the United States exercises a *de facto* jurisdiction over the territory in which the land is located. It is therefore a political question, and non-judicial.

Jones v. *United States,* 137 U.S. 202.
Pearcy v. *Stranahan,* 205 U.S. 257.
See also authorities cited in brief on motion to dismiss writ of error.

The second assignment of error (Tr. p. 68) in effect raises the question that, inasmuch as the matter of determining the boundary between the two nations was pending before the respective political and executive departments of government, it was thereby withdrawn from the court in all cases wherein a party defendant in court might allege or prove that he or she held under a Mexican title. This probably amounts to a plea that the petition should be dismissed and not considered by the court so long as the international title is undetermined by the political departments of the government. It does not offer any new question beyond that considered in the first assignment of error. The cases already referred to decide that, so long as the United States Government assumes *de facto* jurisdiction over the land, it conclusively binds the court, so that a plea that the land is in a foreign jurisdiction will not be, either directly or indirectly, entertained.

The protection of the rights of the plaintiff in error

has already been cared for by the executive department of the government. After the suit was brought against the many defendants, who were claimed to be trespassers or squatters on the land, the United States by agreement with Mexico appointed an officer authorized to pass upon the question of the existence of *prima facie* Mexican title in defendants, and, if such were found to exist, then the court proceedings, so far as they affected such defendants, should be stayed by request of the Department of State. Such officer examined into the question of the *prima facie* title of the defendant (plaintiff in error) to the land in issue, and reported to the government that the United States was not called upon to interfere to prevent ejectment proceedings in her case (Tr. pp. 59-65, and at p. 65).

The third assignment of error (Tr. p. 69). At the close of the plaintiff's evidence the defendant (plaintiff in error) moved the court to instruct the jury to return a verdict for the defendant upon the ground that the field notes of the N. W. Burdett surveys were proved not to embrace the land sued for and described in the plaintiff's petition; which motion was refused (Tr. p. 24), and is the basis of this assignment of error. The meaning of this assignment, as worded, is not very clear. It seems to set forth and assert that the executive branches of the two governments are endeavoring to determine the title of the land on the basis of whether the accretion to the original survey was by slow erosion and accretion or by rapid erosion and accretion, and that, if the court has the right to try the title to said land before the

government determined the boundary, there must be proof that the plaintiff's (defendant in error's) land had by accretion included land "*formerly* owned by the defendant," meaning, apparently at a time when the alleged predecessors in title of the plaintiff in error owned land across the Rio Grande River before it passed by erosion and accretion under the river to the American side, if it ever did get that far. The defendant (plaintiff in error) offered to prove a chain of title to the land she claims down from the State of Chihuahua, or from the Republic of Mexico. She did not make any such proof. She showed that there were certain papers, which one of the witnesses obtained from her husband in the form of alleged deeds, which he, in turn, gave to a civil engineer, who made a sketch, or a plan, and thereafter the witness gave the papers to another party, who lived in New York, now deceased, and that hence they could not be produced; the papers were written in Spanish, which neither of the witnesses could read, and the engineer used some translated papers, but did not know what they were translated from or whether correctly translated. The calls in the translation did not give the course and distance of the measurements (Tr. pp. 27-31). There was no proof that the papers thus seen were deeds, or that the translations were correct, or that they related in any way to the land occupied by the plaintiff in error, or to any land which may have eventually formed on the American side of the river. There was nothing to show that there was any land "formerly owned by the defendant" or her predecessors. The attempt to make such proof was abortive. There was

ample proof to show that the land south of the line of the 1852 survey was formed by accretion. It was stipulated (Tr. p. 23) that the plaintiff (defendant in error) has title to the Burdett surveys Nos. 1 and 2, under said patents and mesne conveyances, and to all land, if any, which in law under the facts belongs to said surveys by accretion. There was no evidence or claim that any of the land had formed by avulsion; the changes occurred many years ago. The measurements in the deed to Frank B. Cotton (Tr. p. 39) and the testimony of the witnesses and maps used at the trial, not certified here (Tr. pp. 41-43), showed that the river boundary in 1881 was the same as at present, and that the accretion land must have formed long prior to that. The stipulation and proof shows that the United States and the State of Texas and the City of El Paso have always exercised governmental control and political jurisdiction over the land (Tr. p. 24). The State Department states "this government has never admitted any derogation of its *de facto* jurisdiction over the Chamizal tract" (Tr. p. 56, middle paragraph). The descriptions in the deeds all give the Rio Grande River as the southern boundary (Tr. pp. 22, 39), and it was stipulated "that the land described in the plaintiff's petition lies between the East line of Survey, No. 1 and the West line of Survey, No. 2 and the Northern boundaries of said Surveys, Nos. 1 and 2 and the present channel of the Rio Grande" (Tr. pp. 23, 24). The District Court was therefore right in refusing to instruct the jury as requested (Tr. p. 24).

The fourth assignment of error (Tr. p. 69) is

based upon a motion, made at the close of the defendant's testimony, that, it appearing from the evidence in the trial "that the land described in the plaintiff's petition was made an addition to the city of El Paso, and streets and alleys were dedicated therein during 1881, 1882, 1883 and 1884, which dedication remained effective, wherefore the plaintiff had no title, or, at all events, no right of possession of the said streets and alleys, and he did not so describe any lots or blocks as to entitle him to recover any of said lots or blocks," the court should instruct the jury to return a verdict for the defendant, which motion the court denied (Tr. p. 66).

There was no evidence showing that the said land was made an addition to the city of El Paso, or that streets and alleys were dedicated therein during 1881 to 1884, or that the dedication remained effective. There was no evidence of so decisive a character in that regard as to warrant an instructed verdict. It appeared incidentally in the course of the evidence that the land in the entire survey, when purchased by Mr. Cotton in 1881, was sketched out and a map made of lots and blocks. Across the center of this the tract was cut in two by the reservation of the Texas & Pacific Railroad. In the part south of this reservation, covering all the land described in the petition in this suit, it was always acreage property, and no lots, blocks, streets, or alleys were ever laid out thereon; the map was never filed or recorded at any time or place; it was described in the evidence as an old, abandoned map (Tr. p. 52). No lots were ever sold south of the Texas & Pacific reservation by that map (Tr. pp. 50, 66). The land was not then within

the limits of the City of El Paso (which was incorporated in 1889), and there was no map ever filed showing the subdivision of the land below the Texas & Pacific reservation (Tr. p. 52). In 1894 J. L. Campbell, City Engineer, made an official map of the City of El Paso, and thereon the land is left blank, with no lots, blocks, streets, or alleys (Tr. p. 50). The property was always assessed as acreage property without regard to lots or blocks (Tr. p. 52).

All of the many witnesses testified (Tr. pp. 41-49) that the land was always undeveloped property, overgrown with bushes; and even the defendant's witnesses testified that it was acreage property since she went in upon the land (Tr. pp. 33, 34).

There was therefore no evidence showing that the owner unequivocally indicated his purpose to set apart, appropriate, or dedicate streets and alleys to the public, or that any streets or alleys had even been laid out or that the public had made use of any of the land for the purpose of streets and alleys, or that streets and alleys in this section, south of the Texas & Pacific reservation barrier, if any such had even been laid out, would be or could be of beneficial value to purchasers of lots north of the Texas & Pacific reservation. The deeds introduced (Tr. pp. 65, 66) showing sales of land "as shown by the maps of said Cotton Addition" related to lots north of the Texas & Pacific reservation. The witness Mr. Patterson, who had charge of the property, testified (Tr. p. 50) that there was never a lot or block sold by the map subdividing the south lands, and that that map was never filed as a public record.

The authorities which hold that dedication of a

street or alley to the public has been made by the making of a plan of subdivision have required either that the plan be properly recorded or else that the street or alley should be in such close relation to the property of the purchasers as to be necessary for the enjoyment of the property. Of those authorities cited by the plaintiff in error in her brief (pp. 21, 22) it was shown in the first, third, and fourth that a plan was duly and properly recorded; by the other authorities cited, the third and fifth, it was shown that the alleys about which the dispute arose were to be laid out for the use of the public, by agreement between the dedicator and the purchasers of adjacent land.

There was therefore nothing of so definite a character in the evidence as to warrant the district judge in holding as a matter of law that a dedication of streets and alleys in this location had been made. The question was not raised by the pleadings, and the evidence was adduced only as incidental to the issues in the case.

The fifth assignment of error (Tr. p. 70) complains that the District Court erred in refusing to submit to the jury the question as to the existence and authenticity of the Mexican title claimed under by the defendant (plaintiff in error), said defendant claiming that sufficient evidence had been adduced to prove the existence and authenticity of such title as to support a finding by the jury in her favor. There has been recited above, under the third assignment of error, the evidence which, as we claim, showed neither proof of such a title nor that the alleged de-

scription could be located on the land (see Tr. pp. 27-31). The defendant (plaintiff in error) also claimed title in her husband, Pablo Cordova, and herself and sons by reason of their adverse, peaceable, and continuous possession of the land for more than ten years before the institution of the suit (Tr. pp. 12, 13), and this claim was by the trial judge submitted to the jury, with other appropriate instructions relating to the case (Tr. p. 67), and the jury, by its verdict, found in favor of the plaintiff (defendant in error) for the land in controversy (Tr. p. 18).

The refusal of the district judge to submit to the jury the question as to the existence and authenticity of the Mexican title in the plaintiff in error is sustained by the authorities herein cited above and also those cited in the brief submitted in support of the motion to dismiss the writ of error, showing that the question is a political one and non-judicial in its nature.

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Attorneys for WALTER B. GRANT,
Executor of the Estate of
Frank B. Cotton, Deceased,
Defendant in Error.

CORDOVA *v.* GRANT, EXECUTOR OF COTTON.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 104. Submitted December 18, 1918.—Decided January 13, 1919.

Plaintiff claimed, under the laws of Texas, land lying between the present and former beds of the Rio Grande. Defendant, claiming under Mexican grants, set up that, as plaintiff's title depended on whether the international boundary had shifted with the river, and as our government, though claiming and exercising *de facto* jurisdiction over the locus, conceded the true boundary to be unsettled, and by its treaties and acts with Mexico had agreed upon a commission with exclusive jurisdiction to settle it, the courts were thereby deprived of jurisdiction, and the case should be dismissed or the trial stayed until the boundary should be established. Our government had rejected the action of a commission which sat under the last of the treaties referred to, and had waived objection, based on comity, to the litigation. *Held*, that the District Court had jurisdiction and might properly proceed with the case, and that its holding to that effect did not involve the validity or construction of a treaty. P. 419.
Writ of error dismissed.

THE case is stated in the opinion.

Mr. Frank G. Morris for plaintiff in error:

It is manifest from the whole course of the pleadings and the evidence and the requested charges refused, and the

exception to the peremptory charge for plaintiff, that the sole question of title at issue drew in question a construction of the boundary treaty of 1889 and the arbitration treaty of 1910, and the action of the arbitrators thereunder and the status of the matters involved in the treaty after the award of June 15th, 1911. It was conceded by the plaintiff in error in his pleadings in the court below that, but for the qualification and limitations as to the effect of the *de facto* jurisdiction exercised in the territory in question by the United States, the exercise of jurisdiction by this government to the Rio Grande, as it at present runs, would express an unqualified determination and decision by the political department of the government that the international boundary followed the present channel of the river, which decision would in that case be binding on the courts.

But it was contended by plaintiff in error that the treaties mentioned gave character to the jurisdiction exercised by the United States, in that the two governments in said conventions treated the international boundary as an open question, to be thereafter determined amicably between them. They said substantially to each other that neither would undertake to decide for itself the true location of the boundary, and that the United States, in virtue of the treaty provisions, might police the territory in question pending a decision by the respective governments. These treaties, therefore, so qualified the jurisdiction exercised by the United States that it did not express a decision by this government that the channel of the present river, or any location south or west of the channel of the Rio Grande of 1852, constituted the true boundary. Hence the contentions arose on the treaty:

1. That as the treaties withdrew from the courts of the respective nations the power to decide the boundary question in cases wherein the title to lands would neces-

sarily depend upon the location of the international boundary, the courts could not decide the titles to lands depending on the boundary until the respective governments should decide the location of the boundary.

2. That if the courts of the United States might, for the purpose of trying titles to land in the territory in question, undertake to decide whether the Rio Grande had receded from its position in 1852 by gradual and slow erosion of the Mexican banks of the river and deposit of alluvium on the American side, the court could not, as it might have done in the absence of the treaty provisions mentioned, presume, from the exercise of *de facto* jurisdiction by this government up to the present channel of the river, that the political department of this government had decided that the change was such as to make the land on the north or east of the river American soil and therefore accretions to the plaintiff's abutting lands. The courts in the United States take notice of treaties and adjudicate rights accruing under them. If the court might try the case it should therefore try it as an ordinary boundary suit between individuals which would require the plaintiff to prove that he had acquired land by accretion. The treaties precluded him from relying on presumptions arising from actions of the political department of the government which were so qualified by the treaties as not to afford the presumption on which plaintiff below relied.

Furthermore, the defendant below relied upon the decision of the Arbitration Commission that the international boundary was the channel of the river of 1864, which was further south and west than the channel of 1852 but not so far south or west as the present channel of the Rio Grande. This contention necessarily involved a construction of the treaty of 1910 as to the powers of the commission and as to the effect of their award under the treaty. And this contention is not dispelled by re-

ferring to the acts of the executive department in refusing to enforce the award. It was not void on its face, and may be made certain by a survey. If so, the executive alone could not nullify the decision or take its effect from the courts when the award comes in question where private rights are involved. *Foster & Elam* v. *Neilson*, 2 Pet. 253.

The cases of *Warder* v. *Loomis*, 197 U. S. 619, and *Warder* v. *Cotton*, 207 U. S. 582, are memorandum decisions which give no statement as to what questions were properly raised in them.

Under § 238 of the Judicial Code there are no rules of pleading or requirement that the federal question be specially set up or pleaded as was required under some of the statutes. Whether a construction of a treaty is by appropriate procedure drawn in question in a trial at law in a district court of the United States or not, must depend on the application to the case of the state procedure and practice in which the court is located.

Mr. Walter B. Grant and *Mr. T. J. Beall* for defendant in error:

Although the answer of defendant and request for instruction in effect refer to the treaty of 1910, and to the action of the boundary commissioners thereunder, the facts show that no question as to its validity or construction is raised. The question being a political one, the case is not reviewable under clause 4 of § 238, Jud. Code. Mere allegations not based upon facts, showing wherein the construction and validity of the treaty are drawn in question, do not create a case under that clause. *Budzisz* v. *Illinois Steel Co.*, 170 U. S. 41.

Neither the trial court nor this court has jurisdiction to determine whether the changes in the river left the land territory of the United States or of Mexico. It was admitted that the United States and Texas have, since the land was formed, exercised government control and

political jurisdiction. It was also shown that the State Department, through an officer appointed for the purpose with the assent of Mexico, had determined that defendant had failed to exhibit such *prima facie* Mexican title as was contemplated by the agreement for protection of the *status quo*, and that there was no occasion to interfere with the action. The boundary question is purely a political one.

Warder v. *Loomis*, 197 U. S. 619, and *Warder* v. *Cotton*, 207 U. S. 582, involved the identical question concerning the land involved in this suit, or land adjacent thereto.

A question of international boundary is for the political departments, and their action binds the courts, leaving no constitutional or treaty question open for judicial determination.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action of trespass to try title to land in Texas lying between the present and former bed of the Rio Grande. The plaintiff (the present defendant in error) alleged that his testator and those under whom the latter claimed had held the land under color of title from the State of Texas for the several statutory periods of limitation, and that the defendant unlawfully entered when the plaintiff had the legal title in possession as devisee. The jurisdiction of the District Court was based upon diversity of citizenship. The defendant pleaded that the plaintiff's title depended upon whether the land was within the United States, and that that depended upon whether the Rio Grande, established as the boundary in 1852, had changed its channel in such a way as to continue to be the boundary or not—the land in question having been upon the Mexican side of the river in 1852 and now being on the side of the United States. The defendant

went on to allege that while the United States now exercises a *de facto* jurisdiction over the territory where the land lies, it does so with the admission by treaty and diplomatic correspondence that the boundary is unsettled, and that "the treaties and acts of the respective governments placing said boundary disputes within the jurisdiction of certain special authorities, of which this court must take judicial notice, must necessarily have deprived the courts of each of said republics of jurisdiction," &c. On this ground it was prayed that the Court either dismiss the case or stay the trial until the boundary should be established. Subject to this the defendant pleaded not guilty and the ten years statute of limitation of Texas. The plaintiff demurred to the plea to the jurisdiction as showing on its face that the United States and Texas were exercising *de facto* jurisdiction over the land; set up that it was agreed between the United States and Mexico that Mr. Wilbur Keblinger should decide what lands in the disputed territory were proper subjects of litigation in the Courts of the United States and of Texas, that he had decided this land to be such, and that his finding had been acquiesced in by both governments. He further alleged that the Government of the United States always had claimed and now claims the land as belonging to the United States, and he denied all the defendant's allegations of fact.

It was agreed that the patents from the State of Texas under which the plaintiff claimed bounded the grants on the Rio Grande, and that if the additions now in controversy had been made by accretion, they belonged to the plaintiff. It also was admitted, and agreed that the Court in deciding upon the demurrer might notice, that the United States, the State of Texas and the County and City of El Paso were then and for many years before exercising government control and political jurisdiction over the property in question and that the United States and

State had enforced their laws over the whole of the same. It was agreed further that the Court might take notice of the correspondence between the Secretary of State, the Mexican Ambassador and Keblinger, the opinion of the Boundary Commission, and the action of the United States thereon. It appeared from the documents that the United States, while admitting that the boundary line was in question between the two countries, never had admitted any derogation of its *de facto* jurisdiction over the tract; that it had suggested to the federal courts that as a matter of comity they should not put into execution writs of ejectment, &c., against persons alleging Mexican titles, but that it found it necessary to limit this comity so as to exclude from it persons who had no *prima facie* Mexican titles in order to stop occupation by squatters who were taking advantage of the Government's forbearance. Keblinger was appointed to determine what persons showed a *prima facie* title. He decided against the defendant and with the sanction of the Government informed the plaintiff that the Government would not object if he should proceed.

The District Court sustained the demurrer to the plea to the jurisdiction and the only color of right to bring the case to this Court by direct appeal consists in a suggestion that the construction of a treaty is involved.

The decision of a Court that it has jurisdiction on the ground taken by the demurrer simply means that the Court finds the Government in fact asserting its authority over the territory and will follow its lead. It does not matter to such a decision that the Government recognizes that a foreign power is disputing its right and that it is making efforts to settle the dispute. The reference to Keblinger and his finding are important only as showing that there is no present requirement of comity to refrain from exercising the jurisdiction which in any event the Courts possess. Jurisdiction is power and matter of fact.

The United States has that power and the Courts may exercise their portion of it unless prohibited in some constitutional way.

If the passage quoted from the answer is sufficient to open the contention that treaties had contracted for the establishment of a boundary commission with exclusive jurisdiction and so had prohibited the Courts from dealing with the question, neither the validity nor the construction of any treaty was drawn in question; or if an attenuated question can be discovered it is no more than formal. A commission sat under the last of the treaties and its action was rejected by the Government as abortive. As the Government had withdrawn its suggestion of comity so far as the present case is concerned, there was no reason why the Court should not proceed to trial, and there is no reason why the present writ should not be dismissed as it was in *Warder* v. *Loomis*, 197 U. S. 619, and in *Warder* v. *Cotton*, 207 U. S. 582. It follows that some other questions argued cannot be discussed.

Writ of error dismissed.